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IN THE

Supreme Court of the United States

OCTOBER TERM, 1926.

No. 719.

MAMMOTH OIL COMPANY, SINCLAIR CRUDE OIL PURCHASING COMPANY and SINCLAIR PIPE LINE COMPANY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF ON BEHALF OF THE UNITED STATES.

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel.

PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA.

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OCTOBER TERM, 1926. No. 719.

Mammoth Oil Company, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, Appellants,

vs.

United States of America, Appellee.

BRIEF ON BEHALF OF THE UNITED STATES.

I. APPELLEE'S STATEMENT OF THE CASE.

A. HISTORY OF THE LITIGATION.

1. The pleadings.

The bill prays for cancellation of a lease dated April 7, 1922, and a contract dated February 9, 1923, between the United States and Mammoth Oil Company; for temporary and permanent injunctions against each of the appellants; for a receivership and for an accounting.

The bill alleges (1) fraud tainting the lease and contract, (2) a fraudulent conspiracy to secure the lease and contract, (3) illegality and lack of authority and (4) the negotiation and execution of the lease and contract in a manner not authorized by law.

By the lease of April 7, 1922, the Government agreed to lease to Mammoth the exclusive right to extract oil and gas in all of Naval Petroleum Reserve No. 3, containing approximately 9,321 acres, for a period of twenty years and so long thereafter as oil or gas is produced in paying quantities, at stipulated royalties; and to sell to Mammoth the royalty oil, gas and casing-head gasoline produced from said reserve.

In consideration therefor Mammoth agreed to drill not less than twenty test wells at designated points and upon the completion of the test wells to continue in good faith to use due diligence to develop fully the entire area. In event of reaching a certain production Mammoth agreed to build a pipe line of at least 25,000 barrels daily capacity, to connect with a pipe line reaching Chicago.

In payment for the royalty oil and in lieu of delivery in kind Mammoth agreed to establish an oil credit in favor of the Government evidenced by oil certificates showing the amount of the royalty oil, gas and casing-head gasoline and the value thereof. Mammoth agreed if and when requested by the Government to construct steel storage tankage at Atlantic Coast points to be designated by the Government, up to but not in excess of such capacity as shall be

estimated to be necessary for the storage of the quantity of fuel oil refined from the royalty oil of the Government. The oil certificates were to be redeemed by Mammoth either in liquidation of amounts expended in the construction of such storage or by the delivery of fuel oil and other petroleum products for use by the Navy, or, under certain conditions, partly in cash.

By the supplemental contract of February 9, 1923, Mammoth agreed to construct storage tankage and facilities for fuel oil and other petroleum products and to fill such tankage with fuel oil and petroleum products. The storage was to be located at Portsmouth, N. H., Melville, R. I., Boston Harbor, Mass., and Yorktown, Va. Construction at Portsmouth was to commence as soon as plans and specifications could be furnished. Oil certificates were to be used to pay for the storage, fuel oil and other petroleum products. On completion of the projects designated, additional projects were to be undertaken.

The answer of Mammoth denied the several allegations of fraud, conspiracy and illegality and averred the expenditure in good faith of more than $6,000,000 in operations under the lease and contract. The separate answers of the Purchasing Company and Pipe Line Company also denied the allegations of fraud, conspiracy and illegality, and averred that they had placed certain improvements on the Reserve under grants from Mammoth, obtained for value and in good faith.

2. Findings and decree of the District Court.

The Trial Judge found that Secretary Denby retained and directed the executive administration and policies relating to the Reserves; that Fall and Sinclair did not conspire to defraud the United States; that there was no fraud connected with the negotiation or execution of the lease and supplemental contract; that the negotiation of the lease was not privately concluded by Fall and Sinclair; that Denby actively participated in the negotiation of the lease and contract and executed the same after mature deliberation and with full knowledge of their terms; that the negotiation and execution of the lease and contract was not attended by undue or unlawful secrecy; and that no responsible and desirous bidder was denied an opportunity to bid.

He concluded that the Act of June 4, 1920, was a special act, and that all things to be done thereunder were taken out of the operation of all general laws; that the Act authorized the negotiation and execution of the lease and supplemental contract without advertisement and competitive bidding; that the lease and contract were legal; that the "oil certificates," whether redeemed for storage, fuel oil or cash, were authorized by the Act; and that the disposition of the royalty crude oil for storage was not a sale but an exchange, and was fully authorized by the Act. The establishment of fuel depots without the prior consent and approval of the Congress was apparently not considered. The Trial Judge accordingly entered a decree dismissing the bill.

3. Findings and decree of the Court of Appeals.

The Court of Appeals interpreted the Act of June 4, 1920, as permitting the Secretary of the Navy in his discretion to make such a lease and such a contract as were made in this case. It held that neither the lease nor the contract violates any law requiring advertisement and competitive bidding, the covering of the proceeds from the sale of United States property into the Treasury of the United States or the locating of fuel depots. To this extent the Court of Appeals affirmed the decision of the Trial Judge.

But the Court of Appeals concluded that fraud and conspiracy to defraud were proved. It found that Fall dominated the negotiation of the lease and contract (R. 819; 820; 828); that the lease was not necessary as a protection against drainage (R. 822); that the existence of invalid placer mining claims was manipulated to the disadvantage of competition (R. 822; 823); that undue secrecy surrounded the negotiation and execution of the lease (R. 824-7; 828; 847); that such secrecy was not justified by military expediency (R. 825); that legal advice was willfully disregarded (R. 827); that Sinclair bribed Fall with $230,500 worth of Liberty Bonds (R. 846-7); that the Trial Court erred in striking from the record certain testimony pertaining to the Liberty Bond transaction (R. 847-9); that the silence of Sinclair and other logical witnesses for the defense was significant (R. 836; 841-2-3; 845-6); that it was unnecessary for the United States to show pecuniary damage

(R. 817); that the lease and contract are not severable or divisible (R. 810; 815); and that the Purchasing Company and the Pipe Line Company were chargeable with notice of the fraud and the conspiracy to defraud at the time they acquired their rights under the Mammoth lease and contract (R. 850).

For these reasons the Court of Appeals concluded that the lease and contract should be cancelled, the appellants should be enjoined from further trespassing upon the lands and that Mammoth should account for the value of all oil and other petroleum products taken under said lease as a *mala fide* trespasser without credit for moneys expended under the lease and supplemental contract (R. 851).

B. THE ISSUES RAISED UNDER THE PLEADINGS AND EVIDENCE.

1. Fraud, not inadequacy of consideration, was the important fact issue.

Appellants seek to limit the issues of fact under the charge of fraud and conspiracy made in the bill to the question of whether the lease was made for an inadequate and improper consideration (Mammoth Brief, p. 11). They state that if it was lawful for Fall to carry on the negotiations, to negotiate without publicity or competitive bidding, to conclude the negotiations without an opinion from the Attorney General as to the legality of the lease, to make the quieting of alleged placer mining claims a condition precedent to the lease, to negotiate the lease and

contract without the participation of the Secretary of the Navy, and if the Government failed to prove that the lease was granted upon an improper and inadequate consideration, then the charge of fraud and conspiracy must fail (Mammoth Brief, pp. 10, 11).

This attempt to limit the issues is not justified by the pleadings and the evidence.

The bill (par. 18, R. 7) recites a conspiracy by Fall and Sinclair to defraud the United States by the execution of the lease of April 7, 1922. It avers (par. 20, R. 7) private and secret negotiations between Fall and Sinclair. It avers (par. 21, R. 8) the failure to have competition. It avers (par. 23, R. 8) Fall's discouragement of other ready and willing bidders and that Sinclair and Mammoth were privy to this. It avers (par. 25, R. 9) that Fall secretly and fraudulently arranged with Sinclair to get quit-claims of valueless rights and made the obtaining thereof a condition of granting the lease in fraud of the United States. It avers (par. 26, R. 9) other private and fraudulent arrangements by Fall and Sinclair. It avers (par. 27, R. 10) a fraudulent suppression of facts by Fall. It avers (par. 28, R. 10) fraudulent conduct on the part of Sinclair and Fall to violate the law to prefer Mammoth, to give valuable rights to Mammoth and to defraud the United States by the lease. It avers (par. 29, R. 10) that the agreements involved are fraudulent as against the United States.

It is wholly untrue to say, as appellants do at pages 11, 49, 50 and 106 of the Mammoth Brief,

that the issues resolved themselves on the bill and answer only and solely into a question whether the consideration given by Sinclair was inadequate. It is fundamental that evidentiary facts need not be averred in a bill of complaint. Throughout the cause the Government has based its claims upon fraud. Inadequacy of consideration has played little or no part in the view of the Government, because it is of no moment in a case based on frauds such as were here proved. (*Pan American Pet. & Trans. Co. et al* vs. *United States.*)

Nor is it true that the case went off merely on an issue of bribery. Both of the courts below recognized that the issue was fraud and that the Government's proofs, including the evidence of bribery, were directed to that issue. The charges of fraud and conspiracy are summarized in the opinion of the Trial Court (R. 226-228).

That the Court of Appeals so understood the Government's contention and affirmatively passed upon it is shown by the fact that that court paid no attention to the alleged inadequacy of consideration; and before it took up any question of bribery of Fall by Sinclair, carefully examined all the badges of fraud relied upon by the Government and found their existence. Thus it dealt with the facts showing these matters from pages 798 to 811 inclusive of the record. By its statement and conclusions it shows beyond peradventure that fraud upon the Government was the issue in this case and that in its judgment such fraud was proved.

Thus at R. 817 the court said:

"The burden is on the party alleging fraud to show the same."

And again:

"While the law presumes the good faith of business transactions, fraud may be the only legitimate and proper inference that can be drawn from the circumstances disclosed."

And at R. 818:

"Nothing is so essential to the perpetuity of representative government as fidelity of public officials. That the highest degree of fairness and honesty is required of them goes without saying, and the same standards apply to those with whom they deal."

And again R. 818:

"In this case appellant claims that the facts and circumstances shown in evidence are sufficient to raise controlling inferences of fraud and bribery, and are inconsistent with any honesty of purpose on the part of Fall and Sinclair. The Trial Court made findings of fact in this case, one of which is that there was no fraud connected with the negotiation or execution of the lease or the supplemental agreement."

And again at R. 821:

"The activities of the Secretary of the Interior in taking care of affairs entrusted by Congress to the Secretary of the Navy were decidedly unusual and indicated a deep interest therein."

Again at R. 822:

> "The drainage question is important only as bearing on the good faith of the lease. It offered an apparently valid reason for leasing the entire Reserve, and was utilized in accomplishing that result."

Again at R. 823:

> "Of course, making the acquisition of these claims a prerequisite of any lease, when Sinclair either had them or was in a preferred position to secure them, was a fraud as to other bidders, and in its effect removed them from the status of qualified applicants. Other companies desiring to bid and obtain leases on Teapot Dome were not placed on the same footing with Sinclair."

Again at R. 823, referring to Fall's evasive statements to many prospective bidders:

> "There was an utter lack of good faith in the matter."

Again at R. 825:

> "For some reason deceit was practiced as to Members of Congress, both by the Navy and the Interior Departments."

Again, R. 826-7 (referring to the letters written to members of Congress and others by the Interior and Navy Departments):

> "They all show an absence of frankness and a studied attempt to deceive, and keep information from Members of Congress."

Again, R. 828:

> "In the transaction of public business there is no necessity for scheming, deception or double dealing, nor unless in well recognized, exceptional matters,—for secrecy."

And again, R. 828:

> "Whether these valuable rights were obtained by bribery or other corruption it is clear that the lease was secured for Sinclair by the influence, aggressiveness and ability exercised by Secretary Fall in his behalf and that the entire situation was so dominated and manipulated by Secretary Fall as to make certain this result."

Again, R. 847:

> "A trail of deceit, falsehood, subterfuge, bad faith and corruption, at times indistinct, but nevertheless discernable, runs through the transactions incident to and surrounding the making of this lease. It should not receive the approval of the Courts. Our conclusion is that the Government has sustained its claim that the lease and contract were procured by fraud and corruption, and that they should be cancelled."

The foregoing excerpts from the opinion of the Court of Appeals demonstrate clearly that fraud was the issue upon which the case was tried and the lease and contract set aside. All of the other elements of fraud were examined by the court and commented upon by the court before it took up the evidence as to bribery. And the evidence as to bribery is treated

as but one element or item in the many significant transactions which spell favoritism, secrecy and fraud.

2. The Pan American decision rules the legal issues, because the lease here was not a conservation measure, but was made to obtain unauthorized fuel depots without appropriation.

By a gloss upon the facts appellants in their statement of the case seek to give a wholly inaccurate picture of the transaction attacked in this case.

Appellants seek by a complete shift of position from that taken in the courts below to demonstrate that the lease and contract in this case were made from a different motive than were those in the Pan American case; that the lease in this case was purely a conservation measure and that the underlying purpose was not, as it was in the Pan American case, to use royalty oil as a consideration for the erection of fuel depots to an amount far in excess of that appropriated for storage by the Congress and at places not authorized by law.

We cannot let this new position of appellants pass unchallenged and shall answer it *in limine*.

In the Pan American case the Government was in receipt of royalty oils from leases made under the Leasing Act of February 25, 1920, from Naval Petroleum Reserves Nos. 1 and 2. The first contract in that case was a contract for the use of these royalty oils as a consideration for the erection and filling of the Pearl Harbor project. The ambitious fuel depot

program of Admiral Robison required more royalty oil to be used as such consideration than the existing leases afforded, and as a result the leases were made to supply that royalty oil to be used in lieu of cash for the building program.

When the exploitation of Teapot Dome was taken up it was determined to make the royalty oil from Teapot Dome supply that portion of the fuel depot program which was applicable to the Atlantic Coast. At that time the Government was, of course, in receipt of no royalty oil from Teapot Dome because no leases had been made on it.

The program was, therefore, reversed to this extent:—that the lease was made calling for the extraction of all the oil in Teapot Dome and it was provided by that lease that the Government bargained and sold any royalty oil arising from the lease to the lessee against which the lessee should set up a continuing credit to the Government evidenced by so-called "oil certificates" which oil certificates it was intended the Government should use as currency or consideration to reimburse the lessee for its expenditures in the building of fuel depots and the filling of the same with fuel oil.

No evasion, no dressing up of the facts to suit a last minute theory, can becloud these facts. They stand out throughout the proofs in the cause. It is obvious that appellants have reformed their whole theory of the case in order to evade and escape the effect of the decision of this Court in *Pan American Pet. & Trans. Co. et al.* vs. *United States.* Atten-

tion to the facts in this case will show that this effort of appellants must fail.

We must quote the two principal witnesses of the appellants in this cause, both of them employees of the United States. At page 611 of the record, Admiral Robison testifies, *inter alia*, as follows:

> "I know that it was within the province of Congress to establish fuel stations. * * * I decided not to go to Congress for authority to do that. The fuel stations to be established under the Pan American contract of April 25th, or under the Mammoth Oil Company contract of April 7th, were to be complete reserve fuel stations. They are what are known in appropriations as fuel depots. The question of the establishment of these fuel depots under these contracts was never submitted to Congress until the contracts had been entered into, nor ever approved by Congress through an act."

And again (R. 611):

> "In a letter dated 8th December I stated that our arrangements with the California Naval Reserve for the exchange of royalty oil for fuel oil in storage would take care of the Pacific situation—Pearl Harbor. I had in mind that some such provision ought to be made for the Atlantic Coast as well. The only available place from which we could get a supply for the Atlantic Coast was Teapot Dome, or the $500,000,—not that the $500,000 would take care of the Atlantic Coast reserve oil, but it would help and we subsequently did use it for the Atlantic situation.

"I did not discuss with Secretary Fall, prior to January 1, 1922, how we were going to provide storage facilities for the Atlantic. I did discuss the Atlantic situation with him at the interview I had with him late in January, 1922, in general terms. I did say to him then that the lease of Teapot Dome would give similar advantages on the Atlantic Coast."

The same witness, at page 636 of the record, said:

"I was familiar with the Act of Congress of August 25, 1914 (38 Stat. 708) that if royalty oil be sold the money should go into a fund which in the discretion of Congress would be appropriated for the needs of the Navy as Congress saw fit. I was familiar with the Act of February 25, 1920, known as the Leasing Act. I was familiar with the fact that under that act the proceeds from royalty oil were to be put into the Treasury of the United States as miscellaneous receipts. My study of the situation therefore showed me that if naval reserve oils were sold, the Navy could not, without the consent of Congress, get the money which would be realized therefrom. I discussed that fact with Mr. Denby, with Mr. Fall and with Mr. Sinclair. The intent of my remarks to all of them was that in order to prevent the money going into the Treasury, a plan must be worked out whereby royalty oil should be given as a consideration for the storage of fuel oil in tanks, and the building of naval depots therefor. It was always the intention of the Navy Department and of the Interior Department, when the contracts were being discussed, and being made, to use all of

the oil certificates under this Mammoth Oil contract for fuel and other petroleum products in tanks to be built and to constitute naval fuel reserve depots.

"Referring to my memorandum of May 11, 1922, which is a memorandum I made for the Secretary of the Navy on the subject of oil certificates, and referring to paragraph 7 of that memorandum in which I say: '7. No royalty oil has yet accrued through drilling in Naval Reserve No. 3 but when such occurs, it is to be used toward construction and filling of further tankage as a reserve for future use by the Navy and at such points on the Gulf and Atlantic Coast as designated by the Navy Department in fulfilment of the requirements of the National Defense.' I will state, it was the full intent as expressed by paragraph 7 of that memorandum, that all royalty oil accruing from No. 3 Reserve should be used in exchange for fuel oil to be placed in tanks to be constructed as part of the naval reserve depots at various points, and that royalty oil should be used as consideration for all of these things.

"Referring to the Atlantic Ocean and Gulf stations under the Navy's war plans, and meaning thereby construction facilities alone, as distinguished from the oil that was to be filled into the storage facilities, I should say that at least $25,000,000 would be a fair figure of the approximate cost; that on the Pacific for construction as distinguished from oil to be filled into the tanks would be somewhat less, perhaps $15,000,000. For the whole project on both coasts, including the oil and petroleum products that were

to be put into the stations when constructed, the plans provided for a cost of a little in excess of $100,000,000, based upon the prices current for fuel oil at the time the estimate was made."

Bain, Director of the Bureau of Mines, said (R. 700-701):

"The method of exchange of royalty oil for storage under the provisions of the Mammoth lease is in effect the same method of exchange as in the Pan American contract, although worked out in one case by a certificate and in the other case by a credit on the books. I had in mind in my original objection that the same logical objection would apply to oil running from both the California and the Wyoming reserves unless the legal objection was as to the mere way of doing it. In the case of the California reserve the contractor agreed to construct and to credit against the cost of construction the royalty oil delivered to him. The contract of April 7 was a lease, that (is) my interpretation of it, under which the Navy leased to the Mammoth Oil Company the ground and received certain royalties and sold the royalty oil and received certain other things, including an option under which they might require construction. Under that lease the operator gave certain certificates or receipts as you might call them for the royalty oil received; and under that contract, as a matter of operation, they went ahead for a series of months before the Navy exercised its option to require construction. The purpose of the lease was to store fuel oil in tanks to be constructed when enough royalty oil had run for that pur-

pose; to store the fuel oil received in exchange for the royalty oil in tanks to be constructed by the operator. Under the Pan American contract of April 25th, the royalty oil was already running to the United States from certain existing leases and that royalty oil was to be used in exchange for fuel oil and construction of tanks."

Again, Admiral Robison in his testimony as to his talk with Denby in late January, 1922, concerning the leasing of the whole Reserve as contrasted with mere protective leasing, testifies as follows (R. 584):

> "The reason for the development of No. 3 Reserve as a whole was because of my insistence upon the necessity of a pipe line in order that the Reserve in that portion of our country could be made military reserves, and the creation of a pipe line was a matter of so large an investment of capital as to require more than a partial development of a small section would involve. * * * He (meaning Denby) said he did not much like to make any unnecessary development. I told him that the unnecessary development was a matter that depended upon a big question, that the complete protection of our property could be secured with certainty only by complete development. I told him that probably with a less development the drainage of the property might be secured against, but if we protected the property against drainage without securing a pipe line we would not have military availability. He agreed on those grounds, connected directly or indirectly with the strengthening of the national defense, to undertake the development of the complete Reserve."

The same witness (R. 589) testifies that at his first meeting with Sinclair in January, 1922, he set forth the Navy's ideas with regard to the Reserves as follows:

> "That the Reserve should be developed as a whole, that a pipe line should be constructed of adequate capacity to care for the production of the field; that the naval proceeds from royalties should be directed towards the erection and filling of specified storage facilities along the Atlantic Coast; that the exchange be operated without the use of cash; that the oil from the wells should be used in exchange for the accomplishment, for naval account, of the facilities to be created. I mean the royalty oil."

Again, referring to the same conversation, the same witness, Robison, says (R. 616):

> "I told Mr. Sinclair when I met him that royalties were not to be taken in cash; that they could not pay them in cash without their going into the Treasury, and they would not be of any use to us. I think it would have been a better proposition to get our royalties in cash than to trade them for building for storage, but it would not have been legal."

Robison's understanding of the primary objects to be obtained from the leasing of the Teapot Dome is further revealed by his statement anent the Beaty proposition (R. 643):

> "* * * I know it did not provide the various things that we called necessary, such as pipe lines, construction and filling of storage

facilities along the Atlantic Coast, without the exchange of crude oil at any time into cash. Those were the three primary features necessary."

In seeking to justify the leasing of the entire Teapot Dome upon the ground, *inter alia*, of the existence of a pressing national emergency, Robison stated (R. 646):

"* * * As to whether I would have decided that the Dome ought to have been leased immediately if there had been no national emergency I may say national emergencies are matters of definition, they are also matters of law, I suppose, but to me there is a genuine national emergency unless we have a defense that is adequate at this time to protect us against any combination of foreign powers. It was greatly accentuated of course by the Japanese situation; but to me there was a general national need that was, at this time, made grave, that is all. I therefore did not take time to examine the question of drainage as I might have done had there been no emergency in the matter. In other words, with information that the drainage situation was threatening, with the knowledge I had of a genuine emergency, I decided to take no time to consider the drainage separately but to go on with the proposition and take no chance with the national security. That is exactly the basis of my decision and I so told Secretary Fall. Prior to the time, however, that I became aware of the probability of drainage in Teapot Dome, I do not think that we were justified in opening up that Reserve, but it took a combination of circumstances to justify our actions as a whole."

The preambles of the lease of April 7, 1922 (Ex. B, R. 14) fully confirm the Government's contention that the purpose of the making of the lease was to get fuel depots built, to get a pipe line built and to get certain other illusory considerations which Fall always boasted about, such as the raising of the market price of Government oil on adjoining territory (the Salt Creek field).

The first preamble asserts that the Government is charged with the duty of "securing and storing a supply of fuel oil for naval purposes, and is desirous of acquiring suitable storage for such fuel oil at points easily accessible to the United States Navy." The second preamble refers to the "risk" of the loss of supply by a reduction of gas pressure through drilling on neighboring territory. The third preamble refers to the desire of the Government to raise the price of Salt Creek royalty oils. The fourth preamble recites that the Government is desirous of "exchanging" crude royalty oil from Naval Petroleum Reserve No. 3 for fuel oil "and is desirous of securing adequate storage facilities for the storing of such fuel oil as is received by it in exchange for said crude oil over and above the requirements for use of the United States Navy."

The above preambles confessedly were drawn by Fall. We therefore have the definite declarations of Robison, Bain and Fall, the three people concerned most nearly in the making of the lease, as to its main, prime and cardinal purpose. We shall hereinafter, at pages 173-81 of this brief, demonstrate

by an analysis of the lease itself that it is capable of no construction except that it was made for the purpose of obtaining fuel depots with credits established by the sale of royalty oil to the lessee.

It is too late for appellants to argue that the lease was made solely as a conservation measure. Concerning this the Court of Appeals said (R. 822):

> "It was not until the full scheme of development of the entire Reserve, with its attendant features, was suggested and became visualized, that these fears of drainage became acute. The drainage question is important only as bearing on the good faith of the lease. It offered an apparently valid reason for leasing the entire Reserve, and was utilized in accomplishing that result."

We shall not here deal at length with the alleged fear of drainage as a motive for making the lease. We deal with this fully (*infra* pp. 61-71). We content ourselves here merely with calling attention to the reversal of position on the part of appellants, brought about by the necessities of their case.

In the Trial Court appellants argued that the Act of June 4, 1920, made it mandatory for the Secretary of the Navy to develop the Reserve and that it was not necessary to show that drainage was taking place in order to authorize the making of the lease (Mammoth Trial Brief on the Facts, p. 43). The Trial Judge made no finding whatsoever on the subject of drainage or possible drainage of the Reserve. He contented himself with a few passing

comments on bits of testimony in the record which might indicate some drainage from neighboring drilling (R. 234; 236; 239).

In the Court of Appeals the appellants in their oral argument and in their printed brief again definitely took the position that the lease was justified by the Act of June 4, 1920, which was a command or mandate to the Secretary of the Navy to take all of the oil out of the ground. Thus at page 45 of that brief they say:

> "The defendant maintains that the Act of June 4, 1920, made it mandatory for the Secretary of the Navy to develop the Naval Petroleum Reserves by drilling wells in the oil sands, either by lease or otherwise."

They were able to persuade the Trial Court and the Court of Appeals, apart from the question of fraud, and upon the mere question of legal power, that the Act of June 4, 1920, authorized, nay commanded, the leasing of the whole Reserve. This was before this Court had spoken in the Pan American case and had definitely said that the Act of June 4, 1920, in no wise altered the policy of conservation of oil in the ground and authorized leasing only so far as the same might be necessary to preserve the underground oil from depletion.

C. THE LEASE IS ENTIRE AND INDIVISIBLE.

Throughout appellants' statement of the case it is argued that the lease of April 7, 1922, consists of

two agreements under one cover,—a primary and basic contract which is a lease, and a collateral agreement relating to the disposition of royalty oils. It is single and entire. It recites the considerations on both sides as single and entire. It sets off the Government's covenants against those of the lessee in each case as an entirety. Appellants further insist that this lease contained four "options" which the Government might exercise. They reverse those so-called options in their order of stating them from the order in which they appear in the lease and thus cause the wholly false impression that the Government might, if it chose, take nothing but cash for its royalty oil. This is absolutely incorrect. Under no conditions could the Government take all cash. We deal with the errors of statement of appellants in this regard hereinafter more fully at pages 184-6 of this brief, but we advert to the matter here lest it should seem that we concur in the appellants' statement of the facts.

D. THE TWO COURT RULE.

Appellants at various points in their statement of the case seek to give the impression that fact findings of the Trial Judge were concurred in by the Court of Appeals. (See pages 12, 13, 14, 19, 30 and 47 of the Mammoth Brief). Such is not the fact. On the contrary the District Court held, in brief, that there was not sufficient evidence to prove any fraud in the making of the lease and contract (R. 275).

On the other hand, the Court of Appeals, after

a review of the whole evidence, disagreed with every one of the fact conclusions of the Trial Court with respect to the probative force of the proofs, and held, with regard to the whole chain of incidents leading up to the making of the lease and contract, that they showed a complete trail of fraud on the part of Fall and collusion between him and Sinclair. After a very full discussion of all these incidents the court summarized its conclusions to this effect at page 847 of the record.

It is true, as the Court of Appeals held, and as the District Court indicated, that there is very little, if any, conflict of testimony. The case does not, therefore, present a difference of opinion between the two courts as to where the truth lies as between conflicting evidence and testimony, but as to what are the reasonable and proper deductions which the court should make from uncontradicted facts. (See the opinion of the Court of Appeals at R. 818).

II. ARGUMENT.

A. PRELIMINARY STATEMENT.

The argument of this appeal naturally divides itself into two main headings. We shall first address ourselves to the findings of fraud by the Court of Appeals. In this connection it will be necessary to any proper understanding of the case carefully to restate the facts and all of the facts in sequential and logical order. This appellants have wholly failed to do. Upon the basis of such statement we shall then comment upon the conclusions of the Court of Appeals and shall seek to demonstrate that it correctly found that the lease and contract were brought about by fraudulent misconduct on the part of Secretary Fall, who dominated the negotiations.

The second main division of this argument will address itself to answering appellants' contentions as to certain questions of law; and especially to the argument that the Act of June 4, 1920, authorized the making of the lease and contract under attack.

B. APPELLEE'S STATEMENT OF THE FACTS.

1. Origin and history of the Reserves.

We content ourselves with referring to the accurate and careful statement of this Court in its opinion in *Pan American Pet. & Trans. Co., et al.* vs. *United States*, for an outline of the origin and history of the Naval Petroleum Reserves, merely supplementing the same by stating that Naval Petroleum Reserve No. 3 in Wyoming was created by Executive

Order of President Wilson dated April 30, 1915 (Pl. Ex. 106, R. 431-2). The Reserve of course falls within the provisions of the Act of June 4, 1920, which is referred to and considered at length in this Court's opinion above mentioned.*

2. Secretary Fall takes full charge and control of Naval Petroleum Reserve matters.

After the execution of the Executive Order of May 31, 1921, referred to in this Court's opinion in the Pan American case, and not here repeated, Secretary Fall determined that he should have sole charge and control of the Naval Petroleum Reserves. On July 8, 1921, he wrote to E. L. Doheny a letter (Pl. Ex. 13, R. 313) in which he said (R. 313):

> "Thus my position is that of * * * a trustee for the Navy for the public lands upon which there is no private claim within the naval reserve."

He went on to say to Mr. Doheny:

> "There will be no possibility of any further conflict with Navy officials and this Department, as I have notified Secretary Denby that I should conduct the matters of naval leases under direction of the President, without calling any of his force in consultation unless I conferred with himself personally upon a matter of policy. **He understands the situation and that I shall handle matters exactly as I think best and will not consult with any officials of any bureau of his depart-**

* For the Court's convenience the act is printed as an Appendix, p. 221, *infra*.

> **ment but only with himself and such consultation will be confined strictly and entirely to matters of general policy."**

This assumption of charge and control by Fall was confirmed in the letter of October 25, 1921 (Pl. Ex. 5; R. 281-3), in which Secretary Denby proposed to Fall (R. 282):

> "7. That **all leases and contracts,** except as provided in Paragraph 6, **will be arranged and consummated by the Interior Department,** copies of same being furnished to the Navy Department **as a matter of information and record only."**

This arrangement was ratified by Fall in his reply letter of October 30, 1921, to Denby (Pl. Ex. 6; R. 283).

3. Origin and development of fuel oil storage plan.

In the meantime, Fall had evolved the idea of using the Government's royalty crude oil as a medium for the purchase of storage facilities. This idea was first expressed in his letter of July 23, 1921, to Denby (Pl. Ex. 2; R. 278-9), in which Fall wrote (R. 279):

> "* * * I suggest the desirability of effecting an exchange of the crude oil received as royalty for an equivalent value of fuel oil, to be stored without expense to the United States by the other party to the exchange. Preferably the exchange should be not only of crude oil for fuel oil in storage, but for the tanks containing the Navy's stored oil. **In other words, my suggestion is that the crude oil be exchanged for tanks and fuel oil, the**

title to both to be vested in the Navy as a result of the exchange.

"If this plan meets with your approval, and you desire me to undertake to consummate the arrangement, I shall be glad to do so. In any event, I should like to hear from you on the subject as soon as possible."

On July 29, 1921, Denby replied that he was glad to acquiesce in Fall's suggestion and that such an arrangement would be of great benefit to the Navy (Pl. Ex. 3; R. 279-80). Almost immediately thereafter, Fall went to the Pacific Coast for the avowed purpose of conferring with some oil companies or oil men and working up some such idea or arrangement (R. 281, 669). He returned from the West in the middle of October, 1921 (R. 281).

After becoming Chief of the Bureau of Engineering on October 8, 1921, Robison studied the records of the Navy Department in relation to the Naval Petroleum Reserves and in the course of such examination came across Fall's letter of July 23, 1921 (R. 570, 574). Upon the return of Fall from the West, Robison, on or about October 20, 1921, discussed with him the exchange of royalty crude oil for fuel oil in storage and told him what he had in mind in regard to storage facilities (R. 602-4, 669). Fall expressed a doubt as to the legality of that proposition, **which involved the ultimate expenditure of a sum in excess of $100,000,000;** but Robison claims he convinced Fall that the plan was legal and Fall then agreed to go along with the storage policy (R. 604, 429, 637). Robison did not

disclose that such storage facilities would constitute an unauthorized establishment of fuel depots (R. 689), which he knew lay within the exclusive province of Congress (R. 611).

About that time Robison, realizing that Congress would undoubtedly make trouble, agreed with Fall to observe secrecy in order that Congress and the public might not know what was being done and thus avoid any trouble (R. 610, 619).

4. The investigation of the possibility of drainage of Teapot Dome.

At a conference in late October, 1921, Fall and Robison discussed with H. Foster Bain, Director of the Bureau of Mines, and A. W. Ambrose, Chief Petroleum Technologist, a report which Carroll H. Wegemann had recently submitted to the Bureau of Mines (R. 576, 664). This report stated that the saddle separating the Teapot Dome structure proper from the Salt Creek structure had been found to be farther south than had been originally thought. Because of this alleged new location of the saddle, Wegemann expressed the belief that drainage of the Reserve was taking place and recommended its development (Def. Ex. 6; R. 320-23). **All agreed, however, that the Wegemann report created merely a suspicion of drainage, which would necessitate investigation but not action** (R. 576). Whereupon Fall instructed the Bureau of Mines to investigate the possibility of drainage of the Reserve (R. 576, 665) and also re-

quested a like examination to be made by the United States Geological Survey (R. 316).

K. C. Heald, an experienced geologist then in the employ of the United States Geological Survey, was selected to visit and examine the Teapot Dome; and upon his return to Washington, in late November, 1921, he reported orally and in writing to the Director of the Geological Survey, George Otis Smith, and with George Otis Smith reported orally and in writing to Fall (R. 316-18). The advice of Director Smith to Fall was that in Heald's opinion there was no imminent danger, if any danger, of the drainage of Teapot Dome proper by reason of wells which might be put down in the Salt Creek field (R. 316). The conclusion of Heald's report was, "No further leasing should be done. The lands last leased (in the Salt Creek field) will permit some slight drainage of unleased land within the Reserve, but this is unavoidable if an effective barrier is to be maintained between the producing wells and the underground storage." The report further says: "That part of the Reserve which it (drainage) will affect must be regarded as one of its poorest portions." (R. 318.)

Thereafter the Geological Survey was never consulted (R. 317, 319, 671, 705). Bain and Ambrose of the Bureau of Mines also investigated the possibility of drainage of the Reserve, but did not express their views thereon until a conference in late January, 1922 (R. 665, 703).

Robison testified that he too investigated the possibility of drainage of the Reserve; that the reports

from the geologists indicated it was not being drained by the Salt Creek field; and that he thought the Reserve was pretty secure (R. 574-5). He further testified that paragraph 9 of the letter of October 25, 1921, which he formulated for the signature of the Secretary of the Navy, distinctly forbade the development of the Teapot Dome reserve (R. 574-5).

5. Fall personally consummates the leasing of Naval Petroleum Reserve No. 3.

In January, 1922, Fall instructed Finney and Bain to look after the negotiations for the Pearl Harbor storage project and informed them that he, Fall, was going to deal with Reserve No. 3 himself (R. 284). Finney and Bain took no active part in the negotiations with Sinclair for the leasing of the Teapot Dome (R. 284-5, 666). **Barring one conference between Sinclair and Robison in late January, 1922** (R. 589, 607, 612), **all negotiations were conducted solely by Fall on behalf of the Government** (R. 326-7, 615). Denby never attended any conference with representatives of the Mammoth Oil Company in this matter (R. 627).

(a) *Sinclair's New Year's visit with Fall at Three Rivers.*

On December 31, 1921, Sinclair and Zevely, his counsel, arrived at Three Rivers, New Mexico, to consult with Fall about a business matter (R. 323, 672). Fall and Sinclair took advantage of this

occasion to discuss the leasing of Reserve No. 3 (R. 323, 609); but this discussion was not in the presence of Bain, who had arrived at Three Rivers on the same train with Sinclair (R. 672).

Immediately thereafter, the General Land Office was ordered by Fall's administrative secretary to prepare a report upon the Pioneer and Belgo placer mining claims, which report was to be made up as soon as possible so that Fall might have it upon his return from New Mexico (R. 285, 329, 333).

These were certain placer mining claims, title to which had been acquired by two companies known colloquially as the Pioneer and Belgo Companies. They covered a large amount of territory in Reserve No. 3. After the Leasing Act, the holders of these claims had applied for leases under the Leasing Act of February 25, 1920, and their applications had been denied by Secretary Payne, and this denial had on rehearing been affirmed by Assistant Secretary Finney. In desperation they had filed a petition for the exercise of supervisory powers by the Secretary of the Interior, and this had been lying undisposed of for some time.

The requested report was submitted on January 12, 1922, and confirmed an earlier report of Glenn B. Morgan to the effect that there were no valid placer mining claims on Reserve No. 3 (Pl. Ex. 21; R. 329-32; 333).

Appellants state (Mammoth Brief, p. 128) that pursuant to the conference in late October, 1921, Fall instituted an inquiry as to pending applica-

tions for leases on Reserve No. 3. This is incorrect. Fall instituted no inquiry until after Sinclair inquired about a lease of the Teapot Dome on his visit to Three Rivers December 31, 1921. Immediately after that visit Fall was most urgent to get a report immediately and before his return to Washington.

Fall arrived in Washington on January 27, 1922 (Pl. Exs. 10, 24 and 25; R. 298, 342). Soon after his arrival, he conferred with Bain, Ambrose and Robison in the office of the Secretary of the Interior (R. 583, 607, 645, 665-6, 703, 707). The date of the conference has not been definitely fixed, but it must have been on the 28th or 30th of January, 1922. The 29th of January was a Sunday. The conference did not last long; probably an hour or an hour and a half (R. 607, 623).

The first subject taken up at this conference was the Western trip of Bain relative to the Pearl Harbor project and the exchange of California royalty crude oil for fuel oil in storage (R. 693-4). Bain gave the details of his visits to the various oil companies on the Pacific Coast and of the reception he had met with; and stated what he thought the prospects were of procuring an oil company to make such a contract (R. 694, 707). The discussion was general and informal and the conversation eventually turned to the possibility of drainage of Reserve No. 3 (R. 694, 707).

Bain and Ambrose reported that the Teapot Dome was subject to drainage, which would increase

with time, **but which was not immediately serious** (R. 665-6, 694, 703, 707). There was some doubt at that time as to whether the saddle of the Teapot Dome structure contained oil or water; and both Ambrose and Bain agreed that if the saddle contained water, it would constitute a seal or wall between the Teapot Dome reserve and the adjoining Salt Creek structure (R. 692). **In fact, drainage of Naval Petroleum Reserve No. 3 was then more a matter of suspicion or fear** (R. 692); **and Bain says he had no realization that their informal conversation was going to dispose of the 9,000 acres of oil land in the Reserve by lease** (R. 694). Teapot Dome was then known to contain two oil bearing sands, known as the First and Second Wall Creek sands. The First was estimated to contain between 50,000,000 and 55,000,000 barrels of oil.

Fall, Bain and Ambrose all knew that the First Wall Creek sand of the Teapot Dome was not subject to drainage because it was sealed off by a water seal from the same sand in the Salt Creek area (R. 691, 706). The only question, therefore, was as to the Second Wall Creek sand.

Fall or Robison then said that the situation should be taken up with the Navy Department (R. 694). Robison stated that the Navy would want a pipe line and also an exchange arrangement, which would provide for storage; but added that this was merely his own personal opinion and that he would therefore take up the matter with the Navy Department in order to see what they wanted to do (R. 695).

At the conclusion of the conference Robison went directly to Denby (R. 607) and reported to him that the danger of drainage of Naval Petroleum Reserve No. 3 was grave and that the Interior Department had recommended immediate action for the protection of the Reserve (R. 584). He personally recommended that action be taken; and after a conference lasting about half an hour, Denby directed him to proceed at once to accomplish the opening and development of the Teapot Dome as a whole (R. 584, 607). Denby expressed opposition to any "unnecessary development." Robison told him that the "unnecessary development" was a matter that depended upon a big question. **He told Denby that probably with a less development "the drainage of the property might be secured against, but if we protected the property against drainage without securing a pipe line we would not have military availability."** Robison said Denby agreed on those grounds, "connected directly or indirectly with the strengthening of the national defense, to undertake the development of the complete Reserve" (R. 584). The next day Robison reported to Fall that Denby believed that Reserve No. 3 should be completely drilled up (R. 607).

Robison testified that he decided to lease the entire Teapot Dome because (1) he insisted upon a pipe line, (2) there was a national emergency and (3) there was serious drainage of the Reserve (R. 584-9, 645). It is significant that Fall too wanted a pipe line (R. 695); that Robison said nothing about a genuine national emergency at the January con-

ference in the office of Fall (R. 695); and that Bain and Ambrose reported at the January conference that the drainage of the Teapot Dome was not immediately serious (R. 703, 707). **In addition, Bain testified without contradiction that there was no necessity for rushing a lease through in three months' time in order to protect the Reserve against drainage, as was actually done (R. 692); and also that there would have been ample time to drill a test well in the saddle of the Teapot Dome structure, and if oil was found there, to procure competitive bids for a lease (R. 692).**

It is uncontradicted that the Navy Department then had an appropriation ample to drill experimental wells and determine thereby accurately the question whether any drainage, and if so, how much Teapot Dome was liable to suffer (R. 608). Ambrose testified without contradiction that his statements at the January conference as to the possibility of drainage did not differ in effect from his written report of February 18, 1922. In that report Ambrose absolutely refuses to state an opinion as to whether drainage is taking place or is threatened, but makes any possibility of drainage conditional upon the contents of the saddle, *i. e.*, water or oil, which at that time could not be ascertained (R. 705; see also *infra* p. 67 this brief).

(b) *Sinclair's proposition of February 3, 1922.*

Within two or three days after the decision to open up and develop the entire Teapot Dome, Sinclair and Zevely, his counsel, appeared in Fall's

office (R. 607). Fall told Robison that he had sent for Sinclair to consider the conditions under which the Reserve was to be opened and instructed Robison to set forth to Sinclair in as much detail as possible what would be necessary in any proposition for the leasing of Reserve No. 3 (R. 589, 607, 612).

Robison then and there told Sinclair that the Reserve should be developed as a whole; that a pipe line should be constructed of adequate capacity to care for the production of the field; and that the proceeds from the royalty crude oil should be directed towards the erection and filling of specified storage facilities along the Atlantic Coast (R. 589, 607, 612). He carefully explained to Sinclair that the royalties were not to be taken in cash because the cash would have to be covered into the United States Treasury (R. 616); and that, therefore, the exchange of royalty crude oil for fuel oil in storage must be accomplished without the use of cash (R. 589, 612). No mention was made by Robison of the outstanding placer mining claims because he had not heard of them at that time (R. 609, 612).

Appellants' brief will be searched in vain for any mention of this conference. This is not strange, in view of their present contention that the lease was made purely as a conservation measure, and not to obtain storage.

On February 3, 1922, Sinclair submitted a written proposition stating the terms and conditions on which he would undertake the development of the entire Reserve (Pl. Ex. 17; R. 324-6). This long detailed

proposition was addressed to the Secretary of the Interior; and contained, *inter alia,* an undertaking to quiet all of the outstanding placer mining claims on the Reserve (R. 324, 325).

Sinclair could not have learned anything about these claims from Robison. The Navy apparently knew nothing about them. He must have discussed them and learned about them from Fall, and Fall's statement must have been the genesis of his proposition to quiet them, which, as we shall hereafter show, in effect cost the United States $1,000,000.

Reference was also made in this proposition to the alleged recent drilling and discovery of oil in the saddle, which Sinclair stated he regarded as conclusive evidence of the fact that the Teapot Dome was not a sealed dome and that the Reserve was then being drained (R. 325-6).

On the same day, Fall and Sinclair personally conferred in Fall's office; and, upon Sinclair's departure, Fall called Ambrose into his office, read to him Sinclair's proposition of February 3, 1922, and ordered him to get up a memorandum on drainage (R. 336, 708). Ambrose rendered his written report on February 18, 1922 (Pl. Ex. 23; R. 337-9). That report showed that until wells had been drilled in the saddle of the Teapot Dome structure certain unknown factors made it impossible to definitely predict whether or not the Second Wall Creek sand of the Reserve was subject to drainage by the Salt Creek field; and stated that if oil should be found in the saddle in the Second Wall Creek sand, then

the leases along the northern boundary of the Reserve would result "in drainage of this sand in the Teapot Dome during the next six or seven years to a point on the south section line of Section 28 T. 39 N., R. 78 W., and if conditions are favorable the productivity of the sand will be affected even farther to the south" (R. 337-39).

This memorandum by Fall's own technical expert wholly negatived any necessity for making a lease. Appellants nowhere refer to it or comment on it. And yet on the very day of its receipt Fall instructed Ambrose to begin the preparation of a lease.

(c) *The drafting of the lease of April 7, 1922.*

Upon the submission of the Ambrose report of February 18, 1922, Fall and Sinclair again conferred (R. 339, 708). In the midst of this conference, Ambrose was called in and introduced to Sinclair and Zevely (R. 339, 708). Fall then outlined the terms of the proposed lease and instructed Ambrose to prepare a rough draft of a lease embodying those terms (R. 339, 708).

The work on the rough draft of the lease was mainly done in the Washington office of Zevely (R. 327, 339). When any controversy arose about what should or should not be in the lease, the question was always referred to Fall, who not only made all decisions as to the terms of the lease but also dictated the preamble and made several changes in the wording of the oil certificate, etc. (R. 327, 339-40). Ambrose was merely permitted to work up the rough draft and to furnish information to Fall (R. 340).

On page 28 of the Mammoth brief it is asserted that Ambrose took part "in the negotiation" of the lease. This is quite incorrect. Ambrose himself testified that he only did the drafting, and that all matters were referred to Fall for decision (R. 340). Zevely, Sinclair's attorney, also testifies that so far as he was aware, Fall made all decisions for the Government, although he did not know with whom Fall consulted before making such decisions (R. 326-327).

The draft of the lease was not submitted to Judge Finney or any other lawyer in the Department of the Interior (R. 285, 339, 405).

On February 28, 1922, Sinclair caused the Mammoth Oil Company to be incorporated under the laws of Delaware (R. 551).

(d) *The purchase and tender of the Pioneer and Belgo claims.*

From January to March, 1922, the secretary of the Pioneer Oil & Refining Company had been preparing data looking towards a proposal to lease the Reserve (R. 345). On or about March 8, 1922, the officers of the Pioneer and Belgo Companies congregated in Washington, learned of Sinclair's bid for a lease of the Reserve; and immediately entered into negotiations with Sinclair for the sale of their placer mining claims (R. 345, 347). These negotiations eventuated in a written contract, dated March 11, 1922 (Pl. Ex. 32; R. 345-6), which provided for the payment of the equivalent of $1,000,000 by Sinclair for the Pioneer

and Belgo claims. Quit-claim deeds dated March 10, 1922, were given by the Pioneer and Belgo Companies to the Mammoth Oil Company (Pl. Exs. 28 & 29; R. 344).

On March 11, 1922, Mammoth formally applied to Fall for a lease of the entire Reserve (Pl. Ex. 27; R. 343-4). At the same time it tendered and filed a quit-claim deed to the United States for the Pioneer and Belgo claims (Pl. Ex. 31; R. 344). Accompanying the application of Mammoth was a letter from Sinclair to Fall (Pl. Ex. 26; R. 342-3), in which Sinclair guaranteed that he would become the owner of all of the capital stock of the Mammoth Oil Company and would personally guarantee the performance of all of its obligations in the event that a lease of the Reserve was granted to Mammoth.

At this time, Robison first learned of the Pioneer and Belgo claims and was then informed that Fall had succeeded at his own instance in securing their surrender as a condition precedent to the execution of the lease (R. 656). But he did not see the quit-claim deeds and was not told by Fall where the latter had gotten them or the consideration paid for them (R. 656). These facts were not known by Robison until perhaps a year later (R. 656).

(e) *The exclusion of other applicants for a lease.*

Although there was no public notice by advertising or circularization of the Government's intention to lease Reserve No. 3 (R. 286), yet there was a large number of inquiries from operators seeking to learn

whether the Teapot Dome would be opened for drilling (R. 620, 676). Certain large and responsible oil interests applied to Fall in vain for a lease on the Reserve.

(1) Frank E. Kistler.

Kistler was Chairman of the Board of the Producers & Refiners Corporation, a Wyoming company engaged in practically all the branches of the oil industry and with assets appraised at $50,000,000 net value (R. 355, 358). This company was considering the making of a bid upon the Teapot Dome structure, if it should be put up for public bidding (R. 357).

In March, 1922, Kistler called on Assistant Secretary Finney and stated that the purpose of his call was to discuss the matter of leasing the Teapot Dome (R. 355-6). Judge Finney replied that there was no need of wasting time with him because that matter was in the hands of Fall and he would have to talk with him (R. 356). Accordingly, Kistler made an appointment with Fall (R. 356).

In discussing the matter with Fall, Kistler first told him something about the Producers & Refiners Corporation; advised him that the company did not wish to be hoggish about the matter and would be satisfied to lease only part of the structure; proposed to lease 640 acres at a twenty-five per cent. royalty; and offered to file a written application therefor (R. 356). Fall replied that he was not ready to receive any applications or to consider the leasing of Reserve No. 3 and could not then consider his proposi-

tion; but promised that he would notify Kistler and give him a fair and equitable chance to bid on the Reserve, if he decided to lease it (R. 356).

There was no discussion about existing placer mining locations nor was anything said to Kistler relating to a possible pipe line or the building of storage tankage in exchange for royalty crude oil (R. 357). Kistler heard nothing further from Fall and subsequently learned from the newspapers that a lease of the Reserve had been granted to Mammoth (R. 357). Robison confessed that he could not remember ever having heard of Kistler (R. 616).

(2) Amos L. Beaty.

Late in February, 1922, James C. Crawford, an attorney, called upon Fall and asked him if there was any possibility of leasing the Reserve or having it developed on behalf of the Government in any way (R. 402). Fall stated that he had been considering such a proposition and had concluded to offer the Reserve for development; but that he would not offer it publicly (R. 402).

As a result of this conference, Crawford got in touch with Mr. Lufkin and Judge Amos L. Beaty, Chairman of the Board and President of the Texas Company, an oil company with a capital of approximately $165,000,000 (R. 348, 402). Beaty sought an interview with Fall and an appointment was made for March 30, 1922 (Pl. Exs. 33 & 34; R. 348). The fact that the interview was sought by Beaty and not by Fall flatly contradicts the often repeated state-

ment by Fall that he had attempted to get a bid or a proposition from the Texas Company (R. 591, 615).

Beaty indicated to Fall that the Texas Company would like to consider the taking of a lease for the development of the Reserve; that his company understood that the Reserve was to be leased; and that he wanted to talk to Fall about it (R. 348). Fall replied that he had a satisfactory proposition from Sinclair, but that he would nevertheless be glad to have the Texas Company also submit a bid (R. 348-9). Beaty then stated the royalties which his company was willing to pay on the basis of the production of each individual well, the royalty to be satisfied by the exchange of naval fuel oil at Atlantic and Gulf ports upon the basis of one to one and a quarter barrels of fuel oil for a barrel of royalty oil dependent upon the place of delivery (R. 349).

Fall informed Beaty that there were certain outstanding placer mining claims on the Reserve; that it would be his policy in leasing the Reserve to require if possible that these outstanding claims be satisfied; and that the company acquiring and taking care of these outstanding claims would naturally be given preferential treatment (R. 349). He also stated that Sinclair had acquired these claims and that he (Fall) then had the conveyance or conveyances in his possession (R. 349).

Beaty told Fall that he was under the impression that quit-claim deeds for these claims had been delivered to Sinclair conditioned upon the latter getting a lease; and that it might be possible for the Texas

Company to meet his policy or requirement (R. 349-50). Nothing pro or con was said on that subject by Fall who mentioned the price paid by Sinclair for the claims (R. 350). Fall said nothing to Beaty about the pipe line (R. 353) or the construction of storage tankage for fuel oil or the exchange of kerosene, gasoline and other petroleum products (R. 349, 355).

It thus appears that Fall did not submit to Beaty a proposition on the part of the Government similar to that which he had then in effect concluded with Sinclair. His failure to do so indicates his desire that Beaty should not bid and his intention to keep him from bidding. **Beaty got the impression that Fall did not care to go any further with him in the negotiation for a lease of the Reserve and that he would not again hear from Fall on the subject** (R. 350). **In this he was correct** (R. 352).

The conversation then shifted to the Salt Creek field and Fall indicated a desire that the Texas Company should become interested in operations in that section (R. 350). Beaty discussed a plan that he had in mind of building a refinery at Casper, Wyoming, and connecting that refinery with the Salt Creek field by a pipe line (R. 350). This appealed to Fall, who then said that the Government had some royalty oil at Salt Creek and stated that they might work out an exchange of royalty oil for fuel oil (R. 350).

Beaty tentatively made the same exchange proposition with regard to the Salt Creek royalty oil that he had previously made in connection with his proffer

for a lease of Teapot Dome (R. 350). No conclusion was reached and Fall took the matter under consideration (R. 350).

Beaty left Washington that afternoon for Asheville, North Carolina, to be gone about two weeks (R. 350). Soon after his arrival there, Fall sent him a telegram inquiring **whether in connection with the Salt Creek royalty oil,** Beaty intended to exchange Navy specification Bunker A fuel oil (Pl. Ex. 35; R. 351). To this telegram, Beaty at once replied by wire that he did (Pl. Ex. 36; R. 351).

Fall wired back, giving the Navy specifications of Bunker A, B and C fuel oil and then inquired if Beaty had meant Navy specification Bunker A fuel oil (Pl. Ex. 37; R. 351-2). Beaty replied by telegraph, stating that he meant Navy specification Bunker A oil in connection **with his lease proposition and that he was still willing to go that far in order to obtain a lease of the Teapot Dome on royalty basis and other terms previously outlined or to be agreed upon** (Pl. Ex. 38; R. 352). He further stated that he thought his tentative proposition **for Salt Creek royalty oil,** though contemplating Navy specification Bunker A oil, was too liberal; and he accordingly withdrew it with the request that he be permitted to substitute Bunker C oil or else decrease the ratio of fuel oil by one-fifth (Pl. Ex. 38; R. 352). He concluded his telegram with the statement that there were a number of details concerning **both the Teapot Dome lease and the Salt Creek purchase, which would have to be considered, and he hoped that Fall could hold**

the matter up until his return to New York one week hence (Pl. Ex. 38; R. 352). **To this last wire, Beaty never received a reply** (R. 352), **and he first learned of the leasing of the Reserve to Sinclair when the matter became public** (R. 352-3).

Fall's utter bad faith in his dealings with Beaty is demonstrated by his conduct with regard to Beaty's propositions. Bain was present when Fall received Beaty's last telegram. Fall on examining it said to Bain that there was no use negotiating any further with Judge Beaty (R. 668, 676, 697). Beaty's proposition was better than Sinclair's on the ratio of exchange of fuel for royalty oil. Fall never took the trouble to ascertain whether Beaty would meet Sinclair's proposition on the amount of royalty to be rendered by the lessee to the Government. He never took up with Beaty the storage tankage proposition. He never discussed with Beaty the building of a pipe line to connect with other transcontinental pipe lines from the Salt Creek Field.

Bain testified that Fall and he knew that the Texas Company was a very large company and entirely able financially to carry out anything that it undertook (R. 697). **He further admitted that Beaty by his telegram of April 6, 1922, clearly showed that he was willing not only to give Navy specification Bunker A oil in exchange for Government royalty oil but also to give substantially twenty per cent. more of such Bunker A oil than Sinclair's proposition involved** (R. 696). **The explanation of such conduct lies in the fact that Bain knew that Sinclair was to have a lease**

of the Reserve sometime before Beaty submitted his proposition (R. 671).

Fall told Robison about the Beaty proposition **after the lease with Sinclair had been agreed upon in all essential respects** (R. 591, 615). **He also told Robison that Beaty's proposal was not as good as Sinclair's** (R. 591, 643, 656-7).

That Fall deliberately misled Robison as to the terms of the Beaty proposition readily appears from the following excerpts of Robison's testimony (R. 653, 656):

> "* * * All I got out of the Beaty offer, the terms of the Beaty offer, is the recollection that their royalties were somewhat lower than we had developed with the Sinclair people; that the pipe line was not going to be put in, nor would they bind themselves for the construction of storage facilities." * * *
>
> "Referring to my testimony that I am not sure whether I saw the telegram from Beaty of April 6th, 1922 (Pl. Ex. 38) I said that Secretary Fall said to me that Mr. Beaty, on April 6th, had telegraphed him that he meant Navy specification Bunker A in connection with the lease proposition, being willing to go that far in order to obtain a lease on royalty basis and other terms outlined, or to be agreed upon. Secretary Fall did not tell me that Beaty was still willing to discuss the terms of a lease. * * * Secretary Fall reported to me that Mr. Beaty had withdrawn his previous proposition with regard to Teapot Dome as too liberal; that the amount he was offering us was decreased by some percentage that he states in the telegram. I think

> 1/5. Secretary Fall stated to me that Beaty had at first been willing to take the lease on Teapot Dome, and had made a certain proposition, and had on April 6th cut that proposition down, and that telegram so states."

It is no wonder that Robison expressed the view in his testimony that the Texas Company had no chance to compete for a lease of Reserve No. 3 (R. 615).

Ambrose, who prepared a rough draft of the lease of April 7, 1922, in accordance with the terms outlined by Secretary Fall (R. 339-40, 591), testified that the offer from Beaty of the Texas Company for a lease of the Teapot Dome was the only proffer of which he ever heard (R. 340).

(3) Birch Helms.

About September 1st, 1921, Birch Helms, Vice-President of the Texas-Pacific Coal & Oil Company, called on Assistant Secretary Roosevelt and Judge Finney in regard to a lease of Teapot Dome; and was informed by them that it was not to be leased (R. 382). Early in April, 1922, Helms was in Washington, and called on Denby to discuss the matter of a lease of the Reserve (R. 382). Denby advised him that the matter was entirely out of his hands and that he should talk with the Interior Department (R. 382). Subsequent to that, Helms talked with Finney and was told by him that the matter was entirely in the hands of Fall (R. 382). He then saw Fall on or about April 10, 1922 (R. 382).

At this conference, Helms related to Fall his earlier

unsuccessful attempt to obtain a lease, and expressed a desire now to submit a bid (R. 382). Fall replied that he would be very glad to entertain such a bid; ascertained from Helms that the Texas-Pacific Coal & Oil Company had no connection with the Standard Oil interests; and then asked if Helms' company was competent to handle the matter (R. 382). Helms expressed confidence in the competency of his company to handle a contract for the Reserve; and they then talked at great length concerning pipelines, tankage and the interchange of oil (R. 382-3).

Helms stated that he had no practical knowledge of the oil business and that the only way in which the matter could be intelligently discussed was for Fall to discuss it with other officials of the company (R. 382). He asked for such an opportunity; and Fall said he would be very glad to confer with them at Three Rivers, New Mexico, where he was going within a couple of days (R. 383).

We know that when Fall discussed the matter with Helms he had signed the lease with Sinclair on April 7. The lease having been executed he discussed storage tankage and other such matters with Helms, although he had sedulously avoided doing so with Beaty. **When Helms left, Fall practically told him that he would entertain a bid from the Texas-Pacific Coal & Oil Company; and accordingly Helms went back and discussed the matter with the officials of his company** (R. 383). He also discussed the matter with Judge Parker of the Texas Company and got definite assurance from him that the Texas Company would

be willing to go in with the Texas-Pacific Coal & Oil Company in handling the Reserve (R. 383).

On April 19, 1922, Helms wired Fall that he had just noticed a newspaper report from Washington, stating that Sinclair had closed a contract for the development of the Teapot Dome structure; and earnestly requested an immediate conference (Pl. Ex. 64; R. 383-4). A second telegram on the same day from Helms called Fall's attention to his previous statement in Washington that he would hold open action on the Teapot Dome structure and the Salt Creek matter for another month; and also referred to the promise made in September, 1921, by Denby and Finney that Helms would be advised as soon as the Government considered the development of the Reserve by private companies (Pl. Ex. 65; R. 384).

Fall replied from Three Rivers, New Mexico, by telegraph that the Teapot Dome matter had been closed but that the Salt Creek royalties would be open until his return to Washington (Pl. Ex. 66; R. 384-5). On April 21, 1922, Helms wired Fall again protesting against his company not having been accorded an opportunity to bid on the Teapot Dome lease and stating that he would be glad to confer with Fall at any time he might appoint with reference to the Salt Creek royalty oil (Pl. Ex. 67; R. 385).

(f) *Fall's private arrangement with Sinclair for certain sub-leases.*

In the late spring of 1921, John C. Shaffer visited Secretary Denby and Secretary Fall about an applica-

tion for a lease on certain lands situate in the Teapot Dome reserve (R. 359). Pursuant to the suggestion of Denby, Shaffer on May 11, 1921, submitted a formal application for a lease on said lands (Pl. Ex. 39; R. 359-61). After the promulgation of the Executive Order of May 31, 1921, this application was forwarded by Denby to Fall (Pl. Ex. 42; R. 361-62); and the latter on June 17, 1921, wrote Shaffer that the Interior Department did not feel warranted in leasing any of the land in Reserve No. 3 at that time and that if circumstances should later justify some development in this Reserve his application which had been placed on file would have the consideration of Fall (Pl. Ex. 44; R. 362-3).

On or about March 16, 1922, Shaffer met Fall in Washington by appointment, and was informed at that interview that Fall was then in negotiation with Sinclair for a lease of the Reserve (Pl. Ex. 49; R. 365). He called Fall's attention to the fact that he had a written application on file in the Department and that he expected to get some of the Teapot Dome land (R. 365). Fall said that he had already told Sinclair of Shaffer's application and that he wanted Sinclair to reserve 200 acres out of the Reserve for Shaffer (R. 365). He advised Shaffer to see Sinclair. Shaffer protested that he was not satisfied with 200 acres and added that in view of his application for 600 acres, he thought that 200 acres was a very small proportion of the 9,000 acres which Sinclair was getting (R. 365). Fall replied (R. 365-6):

"Well, you go up and see Mr. Sinclair and I think you will find him a very reasonable man and you probably will make satisfactory arrangements with him."

At Fall's suggestion, Shaffer met Sinclair in the latter's New York office, and recalled to Sinclair his application for 600 acres of land in the Reserve and said he was entitled to some of the land and wanted that much if he could get it (R. 366). **Sinclair informed Shaffer that Secretary Fall had said to him that he wanted Sinclair to reserve 200 acres of the Reserve for Shaffer, 80 acres of which was to go to Gerald Hughes** (R. 366). Shaffer replied that he had nothing to do with Gerald Hughes in any way and that 200 acres of land would not be at all satisfactory to him (R. 366). At a second conference, Sinclair suggested that Shaffer accept 420 acres in place of 200 acres and this was agreed to by Shaffer in order to get the deal consummated (R. 366).

The result was that Shaffer and Sinclair dickered about the matter for months (Pl. Exs. 51-59; R. 367-373). At no time did Sinclair deny the arrangement with Fall for acreage in the Reserve for Shaffer and Hughes; and on March 23, 1922, Shaffer wired Fall that he had agreed with Sinclair for a certain amount of acreage and was very grateful to Fall for his interest and help in the matter (Pl. Ex. 50; R. 366). Again on April 19, 1922, Shaffer wrote Judge Finney that he had a personal interest in the Mammoth lease of April 7, 1922, and that Secretary Fall had arranged with Sinclair for some acreage

in the Reserve for Shaffer personally (Pl. Ex. 60; R. 373-4).

Between March 15th and April 1st, 1922, Gerald Hughes called upon Fall in Washington, and stated that he had heard that Fall was going to lease the Reserve to Sinclair (R. 711-12). Fall replied that that was correct and that he was now in the process of negotiating a lease with Sinclair, the terms of which he outlined to Hughes (R. 712). He also suggested that he would hear a proposition from Hughes (R. 712). The latter commended the favorable terms of the Sinclair lease and said that the said terms were beyond what he would be interested in (R. 712). A very significant side-light upon this interview is the fact that Fall had also privately arranged with Sinclair to reserve 80 acres of the Reserve for Hughes (R. 366). This private arrangement was never denied.

While appellants quote Hughes' testimony repeatedly as to the favorable terms of the Mammoth lease, they are strangely silent as to Hughes' motives for so doing, and they nowhere comment on the fact that Fall by a private arrangement sought to set aside through Sinclair certain acreage in the Reserve for Hughes.

(g) *The pretended exclusion of Standard Oil interests from the Reserve.*

Fall made a great virtue of the fact that he would not permit any Standard Oil Company to have a lease on the Teapot Dome because the Standard interests already had a monopoly in the adjoining

Salt Creek field (R. 382, 386, 613, 675). He gave this as the reason why he would not deal with the Midwest Company, which controlled the Pioneer claims (R. 386, 591, 675). He constantly harped upon the fact that Sinclair was an independent and a big enough independent to handle the proposition (R. 383, 638).

Nevertheless, Fall knew at the time that the only pipe line concern with which Sinclair was connected was the Sinclair Pipe Line Company, **owned half and half by Sinclair's principal company, the Sinclair Consolidated Oil Corporation, and the Standard Oil Company of Indiana, the then owner of the Midwest Company** (R. 676). He subsequently agreed formally that the Sinclair Crude Oil Purchasing Company should buy the Salt Creek and Teapot Dome royalty oil, and he knew **that company was owned half and half by the Standard Oil Company of Indiana and the Sinclair Consolidated Oil Corporation** (R. 676). It is indeed significant that when Gerald Hughes heard of the proposed lease of Teapot Dome to Sinclair, he said to Fall that in his judgment, Sinclair was acting in co-operation with the Standard Oil interests and that it looked to him (Hughes) "like Maggie in another dress" (R. 713). In answer to this, Fall vouchsafed a laugh (R. 713).

(h) *The execution and concealment of the lease of April 7, 1922.*

By the delivery on March 11, 1922, of the quit-claim deeds to the United States, the "requirement" of

Fall that the Pioneer and Belgo claims should be satisfied, if possible (R. 349), was fulfilled; and everything was now set for the execution of the lease to the Mammoth Oil Company. Robison testified that between March 1st and 10th, it was determined that Sinclair should have the lease (R. 614). About this time, Robison suggested for the first time that it would be a good thing to get some competition; **but Fall thought that competition was not necessary and Robison agreed** (R. 615).

Since February 18, 1922, Ambrose of the Bureau of Mines, and counsel for Sinclair, had been preparing a draft of a lease embodying the terms outlined by Fall (R. 339, 708). They continued to draft and redraft the lease for a month or six weeks (R. 339). **All decisions as to the terms thereof were, however, referred to and decided by Fall** (R. 327, 340), **who also dictated the preamble and made several changes in the lease, including the wording of the oil certificate** (R. 339).

Robison testified that about March 30, 1922, the rough draft of the lease was handed to him (R. 614). The lease in its final form was signed by Fall as Secretary of the Interior "and for the Secretary of the Navy" (R. 635) in the presence of Sinclair, Zevely and Ambrose (R. 340).

There was some question as to whether or not the lease should be signed by Denby; and at or about the time Fall signed the lease, it was determined that it was desirable Denby should also sign it, whether necessary or not (R. 644). Accordingly,

Robison took the lease to Denby, who signed it on or about April 12, 1922 (R. 614, 644). The executed lease, dated as of April 7, 1922, is Exhibit B of the bill (R. 14-36).

The executed lease was that day returned to Fall, who locked it in the drawer of the desk in his office in the presence of Judge Finney and Fall's Administrative Assistant, C. V. Safford (R. 286-7). Fall gave the key to Safford and instructed him and Finney not to make the lease public (R. 287). On the same day,—April 12, 1922,—Fall wrote a letter to Denby (Pl. Ex. 7; R. 287-8) in which he enclosed for the files of the Navy Department (1) a triplicate copy of the lease (2) a Brief Memorandum of the terms and conditions of the lease (Pl. Ex. 7A; R. 288-9) and (3) a Bureau Memorandum of the Interior Department forbidding the giving out of any information whatsoever concerning the lease (Pl. Ex. 7B; R. 290).

In keeping with this extraordinary letter of April 12, 1922 (Pl. Ex. 7; R. 287-8), in which Fall deemed it necessary to outline the terms and conditions of the lease, are the statements by Denby at that time to Representative Mondell and Helms that the entire matter of the leasing of the Reserve had been handled by Fall in person (R. 382, 399). This corroborates the testimony of Robison that Denby never was present at any of the conferences (R. 627) and that Fall represented the Government in all negotiations with the Sinclair interests (R. 615). This fact helps to explain why Denby knew and desired that all mat-

ters of discretion under the lease should be vested in Fall alone (R. 636).

Fall permitted Sinclair to give his personal bond as security for the performance of the terms and conditions of the lease (R. 287). When, however, the news of the leasing of the Reserve began to get out and Congress commenced to investigate matters, pursuant to the resolution of Senator Kendrick on April 15, 1922 (R. 393), Fall wired from Three Rivers to Safford to notify Sinclair immediately to furnish the bond of a surety company in view of this Congressional agitation (Pl. Ex. 103; R. 423-4). Safford assured Fall on April 18 that the matter of the Sinclair bond would receive prompt attention as he had directed (Pl. Ex. 104; R. 424).

Under the heading of "Secrecy" (pp. 77-92 *infra*) will be found the stratagems and means adopted pursuant to the secrecy pact between Fall and Robison to conceal from Congress and the public at large not only the leasing of the Reserve to Sinclair but also the terms and conditions of the lease. Suffice it to say here that the execution and the terms and conditions of the lease were kept secret as long as possible; and were not disclosed until on or about April 21, when in response to a Senate resolution, a joint letter was written by Secretary Denby and Acting Secretary Finney to the President of the Senate (Pl. Ex. 63; R. 378-81). Mimeograph copies of the lease were not available for distribution until on or about April 25 (R. 395); and the first official statement by Fall of his position in the leasing of the Reserve was contained

in his letter of June 3, 1922, to President Harding (Senate Document 210). **In addition, it is an admitted fact that there was no military need for observing secrecy with regard to the lease of April 7, 1922** (R. 624, 627).

6. The execution of the supplemental contract of February 9, 1923.

Robison testified that after the execution of the lease, he considered the question of entering into a supplemental contract to carry out those provisions of the lease which required the lessee to provide, if requested, storage for fuel oil (R. 595). The non-interest bearing oil certificates given under the lease in payment of the purchase price of the Government royalty crude oil could not be used in payment for the construction of fuel oil storage tankage until the Government had requested the Mammoth Oil Company to construct such storage tankage (R. 24-26).

On January 26, 1923, Secretary Denby by letter requested Secretary Fall to give formal notice to Mammoth to construct storage tankage for the Government, and also to prepare such supplemental contract as might be necessary to carry out a certain specified program of storage (Def. Ex. M; R. 596). Such formal notice was given, and on February 9, 1923, a supplemental agreement was entered into with Mammoth for the construction of storage tankage and facilities at certain designated points on the Atlantic Coast (Ex. C of Bill; R. 36-52). The first project under this supplemental contract was to cost

$1,090,000, and was 92% completed at the time that suit was instituted.

C. THE FRAUDULENT CHARACTER OF THE LEASE AND CONTRACT.

We have hereinabove given an outline of the transaction which culminated in the lease and contract under attack. We desire now to go into detail with regard to certain elements in the transaction which stamp it as fraudulent. In this connection we shall briefly summarize and comment upon the findings of the courts below based upon these elements.

1. Protection from drainage was not the motive for the lease.

Appellants now insist that the lease of April 7, 1922, was made only and solely as a conservation matter and because of drainage. We have above (pp. 12-18) pointed out that this is not true. We shall not repeat here in detail what we have there stated. We must, however, call attention in some detail to numerous matters which enforce the finding of the Court of Appeals (R. 822) that drainage was only a cover for the real purpose in making this lease; and which show a fraudulent intent to mask the real object under a supposed necessity for protection from drainage.

There is no contradiction that any supposed drainage of the Reserve by outside drilling would come from drilling in the Salt Creek field. This field lies along the northwesterly boundary of Reserve No. 3.

One would naturally expect, therefore, that if Fall, Sinclair, Robison and Bain wished to save oil from being drained by the Salt Creek wells they would hurry to put in wells along the northwestern border of the Reserve.

The provisions of the lease absolutely negative any such fear on the part of anyone. The lease does not require the lessee to begin operations for the drilling of the first test wells for 180 days from its execution.

Moreover, the lease requires that the first twenty wells in this intensive exploitation of the Reserve are to be scattered all over the Reserve, without any reference whatever to the northwestern border thereof, where, it is claimed by appellants, the drainage would occur. Article II provides that within six months the lessee shall proceed to drill not less than twenty test wells to the Second Wall Creek sand. This article specifies where these wells are to be located (R. 17). There is then a complicated machinery provided for testing these twenty wells (R. 18), and it is stipulated that if an average daily natural production of at least 20,000 barrels is procured, the lessee must then start within sixty days the construction of a pipe line (R. 18).

The same article provides that if the first twenty wells do not produce an average production of 20,000 barrels per day, the lessee must with reasonable diligence proceed to drill a second series of test wells (R. 18-19), and that if upon a testing of the first and second series of wells 20,000 barrels average per day

is obtained, lessee must start the pipe line (R. 19); but if not, then the lessee must at once start a third series of wells (R. 19-20).

It is significant that this Article II expressly provides that the obligation of the lessee to drill test wells of the second and third series ceases and determines if at any time the lessee begins operations to construct the pipe line (R. 20).

That we are not in error in our statement that the location of the test wells is spread all over the Reserve without any reference whatever to the northern portion thereof, which according to the Ambrose report of February 18, 1922, is the only portion which could possibly be subject to drainage, we call attention to maps of the Reserve which were before the Trial Court, and on which for the purposes of this appeal we have located the position of the various wells required by the terms of Article II of the lease.

That the leasing of the Reserve cannot be justified upon the ground of drainage will also appear from the testimony and official reports produced at the trial. The first suggestion of the possibility of drainage is found in an unofficial report prepared by Carroll H. Wegemann in September, 1921 (Def. Ex. G; R. 320-23). This report indicated a belief that drainage of the Teapot Dome was taking place and recommended the development of the property. It was discussed at the conference in late October, 1921, between Fall, Messrs. Bain and Ambrose of the Bureau of Mines, and Robison (R. 576, 664); and they then decided that it created merely a suspicion of

drainage (R. 575, 605), **which necessitated investigation but not action** (R. 576).

Wegemann, formerly of the Interior Department, was at that time in the employ of the Midwest Oil Company and hence naturally interested in the development of the Reserve in Wyoming (R. 320, 323, 575, 644). Robison testified that he investigated the possibility of drainage and that the reports from the geologists indicated that Reserve No. 3 was not being drained (R. 574-5). He further testified that the Wegemann report was the only contrary report and, although interesting, did not really create much suspicion in his mind (R. 575).

As a result of this conference, Ambrose of the Bureau of Mines, was instructed to carefully study the drainage situation with regard to this Reserve (R. 576, 665, 703). The results of his investigation were not disclosed until the conference in late January in the office of Fall after the latter's return from Three Rivers, New Mexico.

On October 25, 1921, Fall consulted George Otis Smith, Director of the United States Geological Survey, and wished to know the opinion of the Geological Survey with reference to the possibility of drainage of the Teapot Dome (R. 316). He asked that an examination be made by a competent geologist; and consequently K. C. Heald was ordered to visit the Teapot Dome and report upon the possible drainage thereof (R. 316). Upon returning from Wyoming, Heald orally reported to Fall a slight danger of drainage, which statement was confirmed by

his written report of November 30, 1921 (Pl. Ex. 16; R. 316-18).

Thereafter, neither the Geological Survey nor any member thereof was consulted (R. 317, 319, 671, 705), although Bain (R. 667, 670, 677, 697), Ambrose (R. 704) and Robison (R. 605, 646) were all familiar with the Heald report of November 30, 1921, and actually discussed it at the conference in the Interior Department in late January, 1922 (R. 705). Robison confessed that he gave no weight to the recommendation of the Heald report that no further leasing should be done in Reserve No. 3 (R. 605).

In his written report of January 12, 1922, upon the placer mining claims, Roy W. Tallman, stated that from a geological and operating point of view, it appeared imperative that the Reserve should not be opened up in any manner (Pl. Ex. 21; R. 332).

Although Bain and Ambrose had visited the Reserve in September, 1921, while on an inspection tour (R. 662-3), and had subsequently investigated the possibility of its drainage under instructions given by Fall at the conference in October, 1921 (R. 576, 665, 703); **yet it is uncontradicted that neither they nor the Bureau of Mines were ever officially requested to recommend the quantum, the order or the character of leasing to be done in the Teapot Dome** (R. 671-2, 705). **Furthermore, neither they nor the Bureau assumed any official responsibility for the leasing of said Reserve** (R. 671-2, 705), **the decision in regard thereto being made solely by Secretary Fall** (R. 672, 706).

At the conference in late January, 1922, Bain and Ambrose reported to Fall and Robison that the Reserve was subject to drainage, which would increase with time (R. 665-6, 694, 703, 707), and accordingly advised that some leasing should be done (R. 665-6); but they then stated that the drainage was not immediately serious (R. 703, 707). **The drainage in question related to the Second Wall Creek sand, since it was then known that the First Wall Creek sand with its estimated 50,000,000 or 55,000,000 barrels of oil was not subject to any drainage** (R. 691, 706).

Bain testified that he had no realization that their informal discussion at this January conference was going to dispose of the 9,000 acres of oil land in the Reserve by lease (R. 694). **In fact, drainage of the Teapot Dome was then more a matter of suspicion or fear** (R. 692); **and there was no necessity in order to protect against drainage to get a lease through in three months' time as was actually done** (R. 692).

There was some doubt at that time as to whether the saddle contained oil or water; and both Bain and Ambrose were of the opinion that if the saddle contained water, it would constitute a seal or wall between Teapot Dome and the adjoining Salt Creek Field (R. 692). Bain admitted that there would have been ample time to drill a test well and if the saddle was found not to be a water seal, then there still would have been ample time to procure competitive bids for a lease of the Reserve (R. 692).

Sinclair in his proposition of February 3, 1922, (Pl. Ex. 17; R. 324-6) reported that the Reserve

was being drained; and alleged as conclusive evidence thereof the recent drilling and discovery of oil in the saddle (R. 325-6). After a conference with Sinclair, Fall on or about February 3, 1922, ordered Ambrose to prepare a written report on the possibility of drainage of the Reserve (R. 336, 707-8). A non committal report was submitted on February 18, 1922 (Pl. Ex. 23; R. 337-9), in which Ambrose stated that until wells had been drilled in the saddle of the Teapot Dome structure, certain unknown factors made it impossible to predict definitely whether or not the Second Wall Creek sand of the Reserve was subject to drainage by the Salt Creek field; and also stated that if oil should be found in the Second Wall Creek sand of the saddle, then the leases along the northern boundary of the Reserve would result

> "in drainage of this sand in the Teapot Dome during the next six or seven years to a point on the south section line of Section 28, T. 39 N., R. 78 W., and if conditions are favorable the productivity of the sand will be affected even farther to the south" (R. 337-9).

It is noteworthy that this report shows that on February 18, 1922, it was not definitely known whether the saddle of the Teapot Dome contained oil or water and also that no well had yet been drilled in that saddle.

Robison testified that he was not influenced by Ambrose's written report of February 18, 1922, because he had already then decided to lease Reserve

No. 3 (R. 608). He claims that Bain and Ambrose reported serious drainage at the conference in late January 1922 (R. 583-4, 607, 645), although Ambrose testified without contradiction that his oral report at that time did not differ from his written report of February 18, 1922 (R. 705). Robison admitted that he knew of the suggestion that a test well be drilled in the saddle of the Reserve and also admitted that the Navy had an ample money appropriation to do so (R. 608); but decided not to investigate because of the existence of a "national emergency" (R. 646) which he never mentioned to his associates at the conference in January, 1922 (R. 695).

On March 24, 1922, Bain voluntarily prepared for the Secretary of the Interior two memoranda (Pl. Exs. 157-8; R. 677-83) in order to show the effect of drainage (R. 677). These memoranda, however, admittedly had no specific reference to the leasing of Reserve No. 3; and were not requested by Fall (R. 683).

In this connection we call attention to the statements in the Mammoth Brief (p. 26) which would give the impression that this data was furnished to Fall and Robison before a decision was made to lease Teapot Dome. The facts are, however, as we have above stated them. Bain admitted definitely on the witness stand that he made up these reports for Fall after leasing to Sinclair had been decided upon. Bain's own language on the subject is as follows (R. 683):

"The memoranda had no reference, specifically, to the leasing of Naval Reserve No. 3, and was not intended as a supporting memorandum for what was being done, except in the sense that it gave specific instances of losses to the government through failure to take into account drainage and to guard against it by leases. I was not asked to furnish the memorandum to give the Secretary some support as to the execution of the lease of April 7, 1922. It would be in my mind a support for that. I had it in mind that it would be a support to the Secretary in making leases upon naval reserves, including Reserve No. 3."

In spite, therefore, of the fact that the information Secretary Fall had with respect to Reserve No. 3 was all one way and consisted of the reports of Heald, Tallman and Ambrose which were in writing, and the conferences with Bain and Ambrose which were oral, he determined to lease the Reserve. These reports one and all indicated as clearly as anything could indicate that there was no immediate necessity for any leasing whatever. They further indicated that any drainage would be at the northern end of the Reserve, and that no one thought there could be any drainage in the southern part. Bain and Ambrose stated that the question whether there would be any drainage depended upon certain underground conditions in the so called saddle. They agreed that no definite conclusion could be reached until those conditions were ascertained. Certain of

the reports furnished Fall clearly indicated that no leasing whatever was required at the time.

It is true, moreover, that despite these reports, Fall, in March, 1922, told Hughes he had determined to lease the Reserve, and that he had a report from the Bureau of Mines, or geologists acting for the Government, that drainage was taking place right along and that under all the conditions the Government should protect itself by making a lease (R. 712). Again, in Fall's memorandum of April 12, 1922, to Denby (Pl. Ex. 7a, R. 288-89), Fall stated that the Mammoth lease was based upon the necessity of preserving the oil from drainage by extracting it and storing it above ground.

It is little wonder that on this showing the Trial Court refrained from making any finding whatever on the subject of drainage, and that the appellants failed to ask the Trial Court to make any such finding.

It is little wonder that on this showing the Court of Appeals said on the subject of drainage (R. 822):

> "That there was remote danger of drainage of a portion of Teapot Dome by virtue of leases in the adjacent Salt Creek Field, is apparent from the record. However, the evidence clearly establishes that there was no immediate danger, and no need for haste. The drainage danger was unquestionably not imminent enough to force immediate action in the leasing of the entire property. It was a matter of five years or more, according to some of the testimony. At no time was the oil in the first Wall Creek sand, estimated

to contain between fifty and fifty-five million barrels of oil, in danger of drainage. It was not until the full scheme of development of the entire Reserve, with its attendant features, was suggested and became visualized, that these fears of drainage became acute. The drainage question is important only as bearing on the good faith of the lease. It offered an apparently valid reason for leasing the entire Reserve, and was utilized in accomplishing that result."

It is to be further noted that appellants' argument that drainage was threatened ignores the fact that if the oil was drained out of Teapot Dome into the Salt Creek field, the Government would have received higher royalties under the existing Government leases in the Salt Creek field (R. 298-9).

2. The use of the invalid Pioneer and Belgo placer mining claims to preclude competition.

The evidence discloses that the so-called Pioneer and Belgo companies claimed to have placer mining locations covering practically the entire area of Reserve No. 3. It is further in evidence that the Department of the Interior had caused an exhaustive examination to be made of these claims by a competent examiner and that a very complete report had been rendered on July 26, 1917, by the examiner, Glenn B. Morgan (Pl. Ex. 9; R. 292-8). This report demonstrated that the claims were invalid and that ample testimony was available to prove their invalidity.

The Pioneer and Belgo companies applied for leases under the Act of February 25, 1920, basing their claim on alleged prior locations (R. 286). These applications were refused by the then Secretary of the Interior, John Barton Payne, upon the ground that none of the claims had been prosecuted to discovery as that phrase is construed by the Interior Department (R. 286). Subsequent to his appointment as Assistant Secretary of the Interior on March 18, 1921, Judge Finney dismissed a petition for a rehearing in the matter, basing his decision upon the same ground (R. 286, 303).

The Pioneer and Belgo companies then filed a further petition for the exercise of the supervisory power of the Secretary of the Interior, which petition was set down for hearing in September, 1921 (R. 286, 303). Judge Finney advised the petitioners that he would not act upon their application but that they might apply to Secretary Fall for a hearing at a date convenient to him (R. 303). **Fall spoke to Finney in connection with this further petition and was told by the latter that the claims "had no validity and no standing"** (R. 286).

This petition of the Pioneer and Belgo companies had not been heard at the time Fall and Sinclair discussed a lease of the Teapot Dome at Three Rivers, New Mexico, on December 31, 1921 (R. 303). Immediately after his discussion with Sinclair, Fall caused a report to be made upon these placer mining claims by the General Land Office (R. 285, 329, 333). Safford, Fall's Administrative Assistant, in ordering

the preparation of the report, gave instructions that it was to be made up as soon as possible so that the Secretary could have it upon his return from New Mexico (R. 329, 333).

A written report was prepared by Roy W. Tallman, Special Agent of the General Land Office, was approved by L. E. Eddy, Chief of Section in charge of the matter of leasing oil lands in the General Land Office, and was submitted on January 12, 1922 (R. 285, 328-9, 333). This report referred to the earlier report of Glenn B. Morgan and observed that the facts gathered by Morgan indicated rather positively that no one had any valid claim of right or title to any of the lands in the Teapot Dome (Pl. Ex. 21; R. 329). It concluded with the statement that "there are no mineral claims to any of the lands in the said naval reserve which deserve serious consideration" (R. 332).

On March 9, 1922, Tallman was ordered to prepare a further report on the Pioneer and Belgo claims, which report was submitted on March 10, 1922, and confirmed the previous report of January 12, 1922, (Pl. Ex. 22; R. 334-5, 333). The supplementary report was delivered to Fall by Eddy, **who advised Fall at the time, as did also Tallman, that all these claims were really closed out and dead** (R. 333).

Robison testified that in January, 1922, he knew nothing of Fall's investigation of the placer mining claims, or of the Tallman report (R. 609). He further testified that he had not heard of these claims at the time of his conversation with Sinclair late in January,

1922; and consequently did not discuss them with Sinclair, when told by Fall to set forth to Sinclair in as much detail as possible what the Government would require in a lease of the Teapot Dome (R. 607, 612, 614). **But Sinclair, in his proposition of February 3, 1922, addressed to the Secretary of the Interior, undertook to quiet all these placer mining claims** (Pl. Ex. 17; R. 324-6); **and quit-claim deeds were actually tendered to the Government on March 11, 1922, as a part of the formal application by the Mammoth Oil Company for a lease** (Pl. Exs. 27, 28, 29 and 31; R. 343-4).

On or about March 11, 1922, Robison first learned of the Pioneer and Belgo claims, the surrender of which Fall had at his own instance secured as a condition precedent to the granting of the Mammoth lease of April 7, 1922 (R. 656). **Fall did not, however, see fit to tell Robison where he got the claims and the consideration paid for them** (R. 656). **But these facts were known to Fall, who had told Beaty the price paid by Sinclair for the claims** (R. 350) **and had advised Hughes that Sinclair knew what he was doing in arranging to get these placer mining claims** (R. 714).

It thus appears from the evidence that Fall was fully advised as to the invalidity and utter worthlessness of the Pioneer and Belgo claims; and it also appears that the acquisition and tender of these claims by Sinclair was entirely a matter of private negotiation between Fall and Sinclair.

Appellants in their brief (Mammoth Brief, pp. 128-134) suggest that although the Interior Department had denied the applicants leases under the Leasing Act, the applicants still retained their placer mining claims for what they were worth. We agree. What were they worth? Every responsible adviser of Fall told him they were worth just nothing. Yet he gave a consideration of $1,000,000 for them because he could not hurry through the lease he wished to make to Sinclair without getting them out of Sinclair's way. Why the need for haste? All his advice was to the effect that he could have taken his time to dispose of these claims. All his responsible advice was (1) that there was no immediate danger from drainage, and (2) that the claims were worthless. Yet to crowd through a lease with Sinclair in record time, secretly and by private negotiation, he arranges for Sinclair to procure and deliver quitclaims of these placer mining locations at an expense of $1,000,000.

The Trial Court characterized this performance as "good business" (R. 256).

It is small wonder that the Court of Appeals in its opinion says (R. 823):

> "Secretary Fall was fully advised of the situation as to these claims and knew they were illegal and practically dead. It was the Government's business to dispose of them—not to permit them to be used as instrumentalities to prevent a 'square deal.' Of course, making the acquisition of these claims a prerequisite of any lease, when Sinclair either had them, or was in a preferred position to secure them, was a

> fraud as to other bidders, and, in its effect, removed them from the status of qualified applicants."

It may be asked, why did not Fall exercise his power by letting Sinclair get these claims and then making leases to Sinclair as the holder of the claims, under the Leasing Act of February 25, 1920? Why did he insist on clearing them up in such wise as to make a lease under the Act of June 4, 1920? A moment's reflection gives the answer. If he had made leases under the Act of February 25, 1920, the provisions of that act would have required him to sell the royalty oil for cash and cover the cash obtained therefrom into the United States Treasury. This would have defeated Robison's pet scheme of getting the royalty oil as consideration for storage, and if it had thus defeated Robison's pet scheme, Robison would have no longer been for making the lease.

Moreover, if leases had been made under the Leasing Act they could not have been made for a total of more than 3200 acres (approximately one-third of the Reserve). They again would have failed to accomplish the purpose that Fall had in mind, namely, to give a lease of the whole Reserve to Sinclair, and would equally have failed to accomplish Robison's favorite scheme of getting all the royalty oil out to pay for fuel storage.

We shall hereafter (p. 201-6 of this brief) comment upon the legality of the use of these placer mining claims as consideration for the lease.

3. The observance of undue secrecy in the negotiation of the lease.

In October, 1921, Fall and Robison, knowing that some members of Congress might object to what was being done, entered into an agreement that secrecy should be observed in order that Congress and the public should not get knowledge of what was being done, until it had in fact been done (R. 619, 610). The impelling motive for this secrecy pact was the fear that Congress would undoubtedly make trouble if the matter were brought to its attention (R. 610).

They were not the only parties to foresee the possibility of such trouble. C. S. Williams, Director of War Plans of the Navy Department, wrote in a letter dated November 4, 1921, to the Chief of Naval Operations that (R. 610):

> "There may be a certain amount of danger in giving too much publicity, because as soon as it is known what the character of the arrangements are, Congress will undoubtedly use these arrangements as a reason for cutting down appropriation for fuel and transportation. If this is done, of course the Reserves which we so badly need, and which we seek to establish, will not be established. Furthermore, it is conceivable that the whole project might be met with open hostility in certain quarters because it operates to some extent to increase appropriations under fuel and transportation beyond what is set down in the bill; **and in another way it operates to create reserve fuel storage, the construction of which has not been specifically authorized by Congress. In view**

of the foregoing it would seem advisable to close the arrangements as soon as possible without undue publicity."

An important step in the consummation of this secrecy agreement was the forestalling and prevention of the possibility of departmental leaks. This was accomplished by handling all matters pertaining to the Reserves in a non-routine manner, and also by the issuance of a departmental order forbidding bureau officials from giving out any information whatsoever.

Fall on April 13, 1922, issued the following departmental order (Pl. Ex. 7B; R. 290):

"Department of the Interior
"Office of the Secretary
"April 13, 1922.

"Memorandum.

"Referring to constant requests for information concerning rumors or statements as to the disposition of naval reserve oil lands:

"The general policy in these matters has been given publicity. In carrying out this general policy as it is being carried out through the cooperation of the Navy Department and of the Interior Department, it is being handled by the Secretary of the Interior and the Secretary of the Navy **but not in a routine manner by either department. The consequence is that the officials of the bureaus of either department are not able to give out any information whatsoever as to the detail of any plans of any kind or character."**

This memorandum was circulated through the Interior Department (R. 690); and was forwarded to Denby in a letter dated April 12, 1922, in which Fall said (Pl. Ex. 7; 287-8):

> "I am also handing you a copy of memoranda which I have made for the government of my staff in giving out any information concerning these contracts.
>
> * * * * * * *
>
> **"I have instructed my office force to give out nothing of the details of any of these contracts and to retain in a secure place the original contract with the deeds, etc. attached. This for the reason that it has been customary to file all contracts with the general files, where by inadvertence they might be subject to examination by parties not entitled to see them.** I am particularly anxious that no details should be given out pending the final agreements upon the contracts for the construction of reservoir facilities in Hawaii."

Apparently Fall had fears lest his order to maintain secrecy might be inadvertently overlooked or forgotten by some bureau chief or departmental official. When it became necessary to prepare the annual report of the Interior Department, he wired the Acting Secretary of the Interior, Judge Finney, on November 6, 1922, from Three Rivers, New Mexico, to prepare the report but cautioned him thus (Pl. Ex. 102; R. 423):

> "* * * think unnecessary go into details Naval oils as we merely cooperating with Navy * * *."

The Mammoth lease was not prepared in the General Land Office where oil leases on the public lands are generally prepared under the usual routine (R. 341-2); but was largely drafted outside of the Department of the Interior in the office of Zevely, personal counsel of Sinclair (R. 327, 339). Neither the Solicitor of the Department of the Interior nor any assistant under him was asked to draft or to pass upon the lease (R. 339, 405). No draft of the lease was submitted to Finney, although he has passed on practically all of the leases that have been made by the Interior Department since his appointment as First Assistant Secretary of the Interior (R. 285), and although Fall had authorized him to handle and sign leases on the Naval Petroleum Reserves (R. 278).

Upon its execution, Fall locked the lease in the drawer of his desk and gave the key to Safford, his Administrative Assistant, with instruction not to make the lease public (R. 286-7). The lease was not promptly filed in the Public Records Office as required under the acts of Congress (R. 626-7); and Sinclair was permitted to give his personal bond as security for the performance by the Mammoth Oil Company of the terms and conditions of its lease (Pl. Exs. 103-4; R. 423-4).

In accordance with his statement to Finney and Bain that he was going to deal with the Teapot Dome himself (R. 284) Fall seldom sought their advice concerning the Mammoth lease (R. 284-5, 666, 671, 673). He first told Ambrose of such a lease on

February 18, 1922, when in the presence of Sinclair and Zevely he outlined the terms of the proposed lease and ordered him to prepare a rough draft thereof (R. 339-40, 708).

First Assistant Secretary Roosevelt (R. 428-9, 431) and Commanders Stuart (R. 316, 626, 641) and Shafroth (R. 407-8, 626), of the Bureau of Engineering of the Navy Department were likewise not kept informed of the leasing of the Reserve. Stuart testified without contradiction that no data touching the proposed leasing went through the Bureau of Engineering and into the official files of that Bureau up to April 5, 1922, on which date he was relieved of his duty in that Bureau (R. 316); **and Robison admitted he told Stuart the intention was to drill necessary offset wells only** (R. 602).

While the Mammoth lease was thus being sedulously concealed from the public at large by enjoining the giving out of information by Government officials, by locking the executed lease in the drawer of Fall's desk, and not filing it in the Public Records Office, and by handling Naval Petroleum Reserve matters in a non-routine manner, the secrecy pact was also being enforced as to Congress and its members.

This was effected by evasive and misleading replies to written and oral requests for information or else by a flat refusal to give any information. Both the Interior and the Navy Departments pursued such a course of action towards Congress and its members. Finney and Bain both testified that pursuant to Fall's instructions, they refused to give out

any information whatsoever about the lease (R. 287, 690-1).

Between October, 1921, and early March, 1922, the Congress apparently made no inquiries in regard to the administration of the Naval Petroleum Reserves. But shortly before March 24, 1922, Congressman French of the House Appropriations Committee called Admiral Robison by telephone and requested certain data relative to the operation of the Reserves. In answer, Robison, on March 24, 1922, sent the following letter to Representative Kelley, Chairman of the Sub-Committee of the House Committee on Naval Affairs (Pl. Ex. 91; R. 415-17):

"24 March, 1922.

"My Dear Congressman:

"On Monday morning Congressman French of the House Appropriations Committee called me on the telephone and requested me to furnish certain information relative to the operation of the Naval Petroleum Reserves.

"As you doubtless know by an Executive Order of the President, dated 31 May, 1921, the general operation, conservation and administration of the Petroleum Reserves was turned over to the Secretary of the Interior. In compliance with the provisions of this order the Navy Department has come to a general agreement with the Department of the Interior relative to the Reserves and the Secretary of the Navy has designated me as his representative to confer with that Department in all matters relating to the Reserves.

"In accordance with the general agreement

arrived at between the two Departments the Department of the Interior is taking steps to have Naval Petroleum Reserves Nos. 1 and 2 drilled with offset wells in every case where adjacent property is drilled. It has been further agreed:

"(*a*) That the amount of drilling with consequent exhaustion of the Reserves shall be kept as low as practicable without risking the depletion of the Reserves by other parties.

"(*b*) That the equivalent of all royalty oil shall be delivered to the Navy in the form of fuel oil at such points on the Pacific Coast as may be found necessary for Naval use, and that this exchange of crude oil for fuel oil will be effected on as favorable terms as it is possible to obtain. It is presumed that under favorable circumstances and terms arrangements may be made for including points on the Atlantic Coast for the delivery of an equivalent supply of fuel oil to the Navy.

"(*c*) That the equivalent of the royalty oil will be placed in storage at such points as the Navy may designate.

"(*d*) That the Interior Department will exercise its best efforts to obtain for the Navy as large royalties and as favorable terms as practicable by public competition or otherwise.

"(e) That the development of Naval Petroleum Reserve No. 3 is to be undertaken only to protect the Government against depletion of the Reserve by other parties.

"In connection with this program it has been estimated that the Navy will obtain by 30 June, 1923, royalty oil amounting to 292,200 barrels, which will give an equivalent in fuel oil of 267,

400 barrels. For the fiscal year ending 1 July, 1923, the royalty oil to be obtained is estimated at 1,350,000 which will give an equivalent in fuel oil of 1,286,460 barrels. Under the terms of the agreement this oil will become a reserve—above ground instead of under ground as now.

"The following data with reference to the Naval Petroleum Reserves are submitted for your information:

* * * * * * *

"As to No. 2 Reserve it is generally admitted that no Reserve as a Reserve now exists and it will be necessary to drill up within a short time the entire Reserve. In order to meet this situation the Department of the Interior is granting leases from time to time to various operators to drill these lands on a royalty basis varying from 12½ to 25 per cent. depending upon the production of the individual lease.

"Trusting that the above information is that which you desire and assuring you that if there is any further information which I can furnish I shall be glad to do so, I am,

"Very respectfully,

"J. K. ROBISON,

"Engineer in Chief, U. S. N.

"Chief of Bureau."

Robison admitted that his letter was not a full statement of what was being done in Reserve No. 3; but attempted in the first instance to justify the concealment of matters from the House Committee on Appropriations upon the ground that he wanted to get the job done (R. 618). He later testified that he

personally delivered the letter to Representative Kelley and then told him what were the plans of the Navy Department and also how far in general terms the negotiations to lease the entire Teapot Dome had progressed (R. 618). **Representative Kelley flatly contradicted this testimony; and testified that he had never had any discussion whatever with Robison about the leasing of the Teapot Dome** (R. 740-1).

Upon receiving a wire from Leslie A. Miller on April 6, 1922, inquiring about the leasing of the Teapot Dome (Pl. Ex. 68; R. 387-8), Senator John B. Kendrick of Wyoming sent his secretary, W. A. Anderson, to the Interior Department for information from Finney (R. 393); **but was told in substance by Safford that no lease on the Teapot Dome had been signed and that Fall would be glad to consider any proposition, which Senator Kendrick's constituents desired to submit** (R. 393).

In response to the request that Senator Kendrick be kept informed of anything that was being done (R. 393), Bain on April 10, 1922, addressed a letter to Kendrick in which was enclosed a copy of the Press Memorandum of April 6, 1922 (Pl. Exs. 70 & 70A; R. 389-90). **Bain frankly admitted this statement was distinctly untrue and known to be untrue on April 10, 1922; but added that he was not at liberty to inform Kendrick that the Teapot Dome lease had been signed** (R. 690-1).

On April 14, 1922, Miller again wired Kendrick submitting a proposition to lease 640 acres of Naval Petroleum Reserve No. 3 (Pl. Ex. 69; R. 388). On

the same date, Governor Brooks of Wyoming wired Kendrick protesting against the then reported private leasing of the Teapot Dome to Sinclair (Pl. Ex. 71; R. 390-1). Having received no information up to April 15, as to the execution of the Mammoth lease, Senator Kendrick introduced a resolution in the Senate requesting the Secretary of the Interior and the Secretary of the Navy to inform the Senate whether negotiations were pending for the leasing of Reserve No. 3 (R. 393; Pl. Ex. 63; R. 378-81). A copy of the Mammoth lease of April 7, 1922, was finally received by Kendrick on April 29, 1922 (R. 393).

Governor Brooks of Wyoming, whose company would have been interested in the development of the Teapot Dome but had no opportunity to bid (R. 399), also wired Representative Mondell on April 14, 1922, protesting against the reported leasing of the Teapot Dome (R. 396). Pursuant to this telegram, Mondell called on Finney in the absence of Fall and was given the impression that no lease of the Teapot Dome had then been signed (R. 394). Mondell wrote to Fall and Denby on April 15, 1922, enclosing a copy of the telegram received from Brooks and requested a reply at their respective convenience (Pl. Exs. 74 & 77; R. 397-8). **Finney replied by letter that the leasing of the Teapot Dome was being considered personally by Fall and that his letter of protest had been transmitted to Fall for consideration** (Pl. Ex. 75; R. 397).

This was, of course, days after the lease had been signed and locked up by Fall. Denby also replied

by letter stating that the leasing of the Teapot Dome was being handled by the Secretary of the Interior in person and that he preferred, inasmuch as the entire matter had been handled by the Secretary of the Interior, that the latter should give all detailed information (Pl. Ex. 78; R. 398-9). This, although it is said Denby executed the lease April 12th and knew all about it.

After the Press Memorandum of April 19, 1922 (Pl. Ex. 62; R. 375), Mondell again called upon Finney and requested that he be permitted to see a copy of the Mammoth lease of April 7, 1922 (R. 394). Finney doubted his authority to give out the lease; and as a consequence, Mondell did not see the lease in the office of the Secretary of the Interior (R. 394-5). He then called on the Secretary of the Navy and was permitted to read the lease in the latter's office (R. 395). A mimeographed copy of the lease was received by Senator Kendrick between April 25 and April 27, 1922 (R. 395).

Senator Harreld on April 14, 1922, asked Denby to furnish him for official purposes with a transcript of all Naval Reserve leases executed since March 14, 1921 (Pl. Ex. 79; R. 403). In reply thereto, Denby wrote a letter (Pl. Ex. 80; R. 404) dated April 20, 1922, in which he stated (R. 404):

> "The executive order transferring the care, custody and operation of the Naval Reserves to the Department of the Interior was signed May 31, 1921, **and since that date the Navy Department is not in a position to give the details of leases that may have been executed**";

named two small leases executed in April and May, 1921, in the California Naval Reserves and then cross-referred Senator Harreld to the Interior Department by saying (R. 405):

> "I trust that this information will serve your purpose. It is quite incomplete, of course, but **accurate details as to the leases that have been entered into since May 31, 1921, can only be obtained from the Department of the Interior.**"

Robison admitted the evasions of this letter (R. 625).

Another example of the practice in the Navy Department of cross-referring Congressional inquiries to the Interior Department is well illustrated by the answer of Admiral Robison to the letter of Representative N. J. Sinnott, dated April 17, 1922 (Pl. Ex. 96; R. 419), in which the latter sought information in regard to the acreage and leasing of the Naval Reserves. On April 19, 1922, Robison wrote to Representative Sinnott (Pl. Ex. 97; R. 420) submitting the acreage of the Naval Petroleum Reserves but stating in regard to the leasing:

> "• • • **I am not able to give this information but it probably can be obtained from the Department of the Interior.**"

Admiral Robison testified on cross-examination that he had not given the information requested by Mr. Sinnott because of his secrecy pact with Secretary Fall (R. 620-1).

Obviously J. T. Tompkins, Acting Chief of the Bureau of Engineering in the absence of Admiral

Robison, had been well instructed by his superior not to give out information with regard to the leasing of Reserve No. 3. On April 20, 1922 (Pl. Ex. 98; R. 420), Representative McClintic had by letter requested information in regard to the acreage and leasing of the Naval Petroleum Reserves and had especially asked:

> "Has the Navy any additional contracts in contemplation for development in any one of the three Naval Reserves?"

In his reply letter of April 22, 1922 (Pl. Ex. 99; R. 421) written in the absence of Robison, Tompkins obligingly gave the acreage of the Naval Petroleum Reserves, referred to the Mammoth lease, then a matter of public knowledge, and closed his letter with the statement:

> "With respect to the remaining questions in your letter, I am sorry to state that I am not in a position to give you accurate data. This matter, as you know, is being handled by the Department of the Interior and I would suggest that inquiry be made of that Department for this data."

Representative McClintic was not discouraged by this cross-reference but wrote a letter to Fall (Pl. Ex. 100; R. 422) and finally received the desired information from Finney on May 2, 1922 (Pl. Ex. 101; R. 423).

We have so far considered the efficacious manner in which the secrecy agreement between Fall and Robison was rigidly enforced within the Interior and

Navy Departments and also as against Congress and its members. Secrecy was likewise observed as against the public at large and also as against those parties who unsuccessfully sought a lease on Reserve No. 3.

Despite the fact that there was no publication or notice of the intention of the Government to lease the Teapot Dome (R. 286), Fall received a large number of inquiries in regard thereto from applicants for leases thereon (R. 620, 676). We have already had occasion to consider just how Fall treated those parties, who called in person at the Department of the Interior and sought a lease on the Teapot Dome (pp. 43-52 *supra*). The documentary evidence discloses that those applicants who entrusted their inquiries to letters received no information whatever concerning the proposed leasing of the Teapot Dome. The inevitable answer, almost stereotyped in form, was that the application had been received, that no drilling was to be done except for offsetting purposes, that no leases had been granted and that the Department was unable to give any further information with reference thereto. The following excerpts are typical:

> "The so-called Teapot structure in Wyoming is included in what is known as a Naval Petroleum Reserve, and at the present time no leases have been granted therein or orders or regulations issued, offering the land for leasing. Am not able at this time to give you any further information with reference thereto."
>
> (Pl. Ex. 87; R. 412-13.)

* * * * * * *

> "I have to advise you that some investigations as to the situation of this Reserve are now under way, but unless they show a need for immediate drilling, it is the disposition of the Department to hold the Reserve intact for the present."
> (Pl. Ex. 81; R. 409.)

On April 6, 1922, the Inland Oil Index wired the Secretary of the Navy asking a confirmation or denial of the reported leasing of the Teapot Dome to the Sinclair interests (Pl. Ex. 92; R. 417). On April 7, 1922, the Secretary of the Navy replied by wire as follows (Pl. Ex. 93; R. 417-18):

> "Matters connected with development of Naval Petroleum Reserves are being handled by the Secretary of the Interior. Navy Department has made no contract for development of Teapot Dome."

Robison justified this misleading statement upon the ground that the Inland Oil Index had no right to knowledge of what was being done in the Navy Department (R. 620).

The opinion of the Trial Judge entirely ignores the October, 1921, secrecy pact between Fall and Robison and the many deceptive replies written pursuant thereto to members of Congress and the public at large. He expressly found that (R. 273):

> "* * * the negotiation and conclusion of said agreement (lease) was not attended by undue or unlawful secrecy."

But the Court of Appeals in its opinion under the heading of "Fraud" discussed at length the deceit

practiced as to members of Congress both by the Navy and Interior Departments (R. 824-27) and concluded (R. 828):

> "In the transaction of public business there is no necessity for scheming, deception or double-dealing, nor unless in well recognized, exceptional matters,—for secrecy. There was no legitimate reason for such secrecy as was thrown around this transaction. Secrecy is an aid to corruption—publicity its foe. If the secrecy was not to veil an ulterior purpose, it was, at least as to Congress, to ward off any investigation until after the leasing was completed."

(a) *Such secrecy not justified by military expediency.*

Admiral Robison has admitted that there was no military need for secrecy so far as the leasing of the Reserve was concerned; **and that the lease could have been given complete publicity without giving away any military matters of any kind** (R. 624, 627).

During the trial, reference was made to the letter of Acting Secretary of the Navy Roosevelt to the Secretary of the Interior dated December 9, 1921, in which he requested that all matters pertaining to the Pearl Harbor project should be regarded "in as confidential a manner as possible" because "this project is embodied in the War Plans of the Navy" (R. 703, 709). Both Finney and Bain understood that this injunction of secrecy related to the Pearl Harbor oil tanks (R. 703, 701); and Robison explained that the Navy Department desired, so far as possible,

to conceal the location of such tanks up to the moment that active construction was undertaken, at which time he freely admitted the world would necessarily learn of the Navy's storage plans (R. 627).

Appellants no longer strive to justify the observance of secrecy on military grounds, although their brief contains the fugitive hint that war plans of the Navy are secret (Mammoth Brief, pp. 145-49). The Court of Appeals, however, in the face of the above uncontradicted evidence of Robison, found (R. 825):

> "* * * The evidence negatives any idea of a military need for secrecy in the leasing of Teapot Dome."

4. Wilful disregard of competent legal advice as to illegality of fuel oil storage plan.

When Fall and Robison first discussed the exchange of royalty crude oil for fuel oil in storage in the fall of 1921 and Robison had explained in detail his plans for storage facilities, Fall expressed a doubt as to the legality of the proposition; but Robison says that he then convinced Fall that it was legal and Fall agreed to go along with the storage policy (R. 603-4).

In January, 1922, Bain went to California to interest certain oil companies in the Pearl Harbor fuel oil storage project and there learned that Mr. Sutro, counsel for the Standard Oil Company of California, Mr. Weil, counsel for the General Petroleum Company, and Mr. Herrin, counsel for the Pacific Oil Company and the Associated Oil Company, were of

the opinion that the fuel oil storage plan was illegal (Pl. Exs. 160-61; R. 684-8, 672-3). **These objections to the legality of the storage proposition were discussed by Fall, Finney, Bain and Robison** (R. 292, 304, 614, 672-3, 688); **and Fall told Robison that he feared that people would not bid on the Pearl Harbor contract and lease because of this question of legality** (R. 614).

Although the advisability of taking the opinion of the Attorney General was several times discussed, Fall opposed such action upon the ground that an adverse opinion might be prepared by some technical lawyer of that department; and that if such an adverse opinion should be signed by the Attorney General, he would be estopped from doing anything (R. 688-9). The result was that the Attorney General was never consulted (R. 434).

Despite the fact that Bain had suggested on January 25, 1922, the advisability of obtaining an opinion of the Solicitor of the Department of the Interior (Pl. Ex. 159; R. 684), and despite the fact that Finney on April 24, 1922, assured Senator LaFollette that every lease issued by the Department of the Interior "receives the consideration of its legal officers, and, of course, the issuance involves the conclusion that full authority for the action taken exists" (Def. Ex. V; R. 735); neither the Solicitor nor any other lawyer of the Interior Department was consulted or passed upon the lease or assisted in its drafting (R. 339, 405). The explanation is alleged

to lie in the fact that Fall believed he knew more law than anybody else in the Interior Department (R. 634).

Robison admitted on cross-examination that the Mammoth lease called for the construction of "fuel depots," and that he knew it was within the province of Congress to establish them (R. 611). This was in effect what C. S. Williams' memorandum of November 4, 1921, pointed out when it said that the exchange of royalty crude oil for fuel oil in storage operated "to create reserve fuel storage, the construction of which had not been specifically authorized by Congress" (R. 610). **Nevertheless, Robison decided not to go to Congress; and Congress never approved of the establishment of these fuel depots** (R. 611, 640, 652), **which involved an ultimate expenditure in excess of $100,000,000** (R. 429-30, 637). Nor did Robison discuss with Fall or Bain the fact that this form of dealing constituted the establishment of naval fuel depots without an appropriation by Congress and without the designation of the places therefor by Congress (R. 689).

Prior to the adoption of the plan to exchange royalty crude oil for fuel oil, the Navy Department was accustomed each year to request of Congress an appropriation for the establishment of fuel depots at certain specified points; but after the adoption of said plan such requests were no longer made of Congress (R. 432-4).

Both the Trial Court and the Court of Appeals

held that the Act of June 4, 1920, was ample authority for the Mammoth lease and supplemental contract (R. 271; 816). In disagreeing with the decision of the Ninth Circuit Court of Appeals in the Pan American case, the Court of Appeals called attention to the fact that that case was then pending in this Court and that this legal question would be there settled. The opinion of this Court in the Pan American case establishes beyond peradventure the illegality of the instant lease and contract. We quote the following language from the opinion:

> "• • • The work to be paid for in crude products contemplated the construction of fuel depots. • • • The record shows that the Navy Department estimated the cost of proposed storage plants and contents at approximately $100,000,000. • • • The Act of August 31, 1842, 5 Stat. 77 (R. S. 1552), gave the Secretary authority to construct fuel depots. But it was taken away by the Act of March 4, 1913, 37 Stat. 898. Since that time Congress has made separate appropriations for fuel stations at places specifically named. And it has long been its policy to prohibit the making of contracts of purchase or for construction work in the absence of express authority and adequate appropriations therefor. R. S. 3732, 3733; Act of June 12, 1906, 34 Stat. 255; Act of June 30, 1906, 34 Stat. 764. The Secretary was not authorized to use money received from the sale of gas products. All such sums are required to be paid into the Treasury. R. S. 3617, 3618, as amended, 19 Stat. 249."

And again:

> "It was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the Naval Petroleum Reserves. The purpose of the representatives of the Department was to get for the Navy fuel depots or storage facilities that had not been authorized by Congress. The leases were made to obtain the crude products for use as a substitute for money to make good the amounts advanced by petitioners to pay for such improvements. The Secretary's authority to provide facilities in which to 'store' naval reserve petroleum or its products did not extend beyond those that might be provided by use of the money made available by the Act of June 4, 1920."

5. Fall's dominance of the negotiations.

As soon as the administration of the Naval Petroleum Reserves had been transferred to the Secretary of the Interior by the Executive Order of May 31, 1921, Fall lost no time in assuming full charge and control thereof.

By July 8, 1921, he was boldly proclaiming that he would handle matters pertaining to the Naval Petroleum Reserves exactly as he thought best; that he would not consult with any Navy official, except Roper; and that any such consultation would be strictly and entirely confined to matters of general policy (R. 313). This authoritative position was acknowledged and confirmed by the letter of October 25, 1921, which expressly provided that all leases

and contracts should be arranged and consummated by the Interior Department and that copies of the same should be furnished to the Navy Department only as a matter of information and record (R. 282).

Agreeably to and confirmatory of such full charge and control, Fall dominated the negotiations leading up to the leasing of Reserve No. 3 to Sinclair. At his sole instance, the Pioneer and Belgo claims were investigated immediately after his conference with Sinclair at Three Rivers, New Mexico, on December 31, 1921 (R. 285, 329, 333). It was Fall who personally sent for Sinclair after the conference in late January, 1922 (R. 589, 607, 612). It was also he who ordered Ambrose on February 3, 1922, to prepare a report on drainage (R. 336, 708) and again on February 18, 1922, to prepare a rough draft of a lease embodying certain terms that he outlined (R. 339, 708).

Not only did Fall thus take the initiative on every important occasion; but also in the many conferences with the Sinclair interests he was the sole representative of the Government, to whom all matters were referred for decision. Robison admitted that he allowed the Interior Department to do the negotiating and bring the results to him (R. 615). Zevely testified that between February 3, 1922, and April 7, 1922, there were many conferences in Fall's office between Sinclair and himself, representing the Sinclair interests, and Fall, representing the Government; and also that when any questions over the lease came up, they usually dealt with Fall, who

usually decided what should or should not be in the lease (R. 326 7). Ambrose was permitted to work up the rough draft of the lease and to furnish information; but Fall decided the terms (R. 340).

Strongly corroborative of such testimony are the following significant facts, viz: that Fall and Sinclair privately and unknown to Robison arranged for the surrender of the Pioneer and Belgo claims to the United States (R. 669, 612, 676); that Fall and Sinclair privately arranged for the giving of Sinclair's personal bond (R. 287); that Fall and Sinclair likewise privately arranged for acreage in the Teapot Dome Reserve for Shaffer (R. 365 6) and Hughes (R. 366); that Fall and Sinclair privately conferred about the latter's proposition of February 3, 1922 (R. 336, 707 8); that Sinclair addressed to the Secretary of the Interior his proposition of February 3, 1922 (R. 324), his letter of March 11, 1922 (R. 342 3) and the application of the Mammoth Oil Company for a lease (R. 343 4); that Fall himself decided to go no further with Beaty of the Texas Company, who had submitted a proposition for the leasing of Reserve No. 3 (R. 676, 697); that all applicants for leases on the Reserve were invariably referred to Fall with the statement that he was personally handling that matter (R. 382, 397, 399); that Fall never asked Bain or Ambrose or the Bureau of Mines to recommend or assume responsibility for the quantum, character and order of leasing the Teapot Dome (R. 671 2, 705), the decision in that respect in the Interior Department being made by

Fall himself (R. 672, 706); and that Fall did not consult with Finney (R. 284-5), Bain (R. 656), the Solicitor of the Interior Department, or any lawyer therein (R. 339, 405), or the Attorney General (R. 434).

Little wonder, then, that Fall took care that he should not relinquish that full charge and control after the signing of the Mammoth lease. Again we revert to the testimony of the chief witness called by the defence. **Robison confessed that it was the purpose of that lease to vest every discretionary power therein and thereunder in Fall** (R. 633-6); and further confessed that Denby not only knew this but was also desirous of it (R. 636).

Finally, after the lease had been executed, Fall locked it in the drawer of the desk in his office and gave oral and written instructions that no information should be given out concerning it (R. 286-8, 280). It was his orders which caused the substitution of a corporate surety bond in lieu of Sinclair's personal bond at a time when Congressional trouble was breaking forth (R. 423-4).

The Court of Appeals has definitely found from the evidence that Fall dominated the negotiations. Thus at R. 820, it is said:

> "Secretary Denby seemed to have so little information concerning the leasing of Teapot Dome that Secretary Fall thought it necessary to write him a long letter of date April 12, 1922, explaining the same. The evidence shows it was also explained to him by Admiral Robison before he signed the lease on April 12, 1922."

And again it is said (R. 821):

> "The activities of the Secretary of the Interior in taking care of affairs entrusted by Congress to the Secretary of the Navy were decidedly unusual and indicated a deep interest therein."

Again it is said (R. 828):

> "Whether these valuable rights were obtained by bribery or other corruption it is clear that the lease was secured for Sinclair by the influence, aggressiveness and ability exercised by Secretary Fall in his behalf and that the entire situation was so dominated and manipulated by Secretary Fall as to make certain this result."

Appellants seek to put upon the situation a gloss that Fall was acting as the mere subordinate of Denby in respect to the reserves (Mammoth Brief, p. 110). The proofs and the findings of the Court of Appeals flatly negative any such contention.

At page 111 of the Mammoth Brief, appellants indicate that Fall had had some change of heart after he wrote his declaration of July 8th that he proposed to handle the reserves exactly as he saw fit. They attempt to draw the parallel between what he did in March, 1922, and what he said in July, 1921. An examination of the record however, from which we have given above full citations, shows that from start to finish Fall dominated and controlled the negotiations and accomplished those ends which he himself had in view, irrespective of the wishes of anyone else.

In answer to the statement of counsel at the middle of page 114 of the Mammoth Brief, that the Court of Appeals fails to point to a single item to show Fall's dominance, we merely desire to refer to the language of the Court of Appeals on page 820 of the record, wherein that court refers to many of the matters we have above mentioned as significant.

6. Submissiveness of Secretary Denby.

In striking contrast to the lone hand played by Fall in administering the Reserves and negotiating the Mammoth lease, is the self-imposed inaction of Denby.

His first official act in connection with the Naval Petroleum Reserves was the voluntary surrender of their administration to the Secretary of the Interior. Early in May, 1921, he suggested that Fall should be placed in charge of the Reserves (R. 308); and when the proposed transfer met with opposition in the Navy Department, Denby took the position that the question of retaining the Reserves solely under the jurisdiction of the Navy Department was not open to discussion and that the Reserves would be transferred to the Interior Department (R. 408, 428).

Once the Executive Order of May 31, 1921, had been signed, Denby refused to shoulder any responsibility whatever and committed all matters pertaining to the Reserves to Fall. An early example of this was his ready acquiescence in the suggestion by Fall that the latter undertake to consummate

an arrangement, whereby royalty crude oil might be exchanged for fuel oil and storage tanks (R. 279-80). And his policy of passivity was openly expressed in the policy letter of October 25, 1921, in which he declared that all leases and contracts should be arranged and consummated by the Interior Department; and that copies of the same should be furnished to the Navy Department only as a matter of information and record (R. 282).

Not only did Denby not attend any conference during the negotiations eventuating in the Mammoth lease, but also he never conferred with Fall touching that lease (R. 627-8). He took the position that the leasing of the Reserve was entirely out of his hands and that the entire matter was being handled personally by the Secretary of the Interior (R. 382, 389). He knew and desired that all discretionary powers under the Mammoth lease should be vested in Fall (R. 636). The signature of Denby was added to the Mammoth lease only as a last moment precaution (R. 644), and after Fall had signed on his behalf (R. 635).

Denby permitted Robison to prepare for his signature all important letters relating to the Naval Petroleum Reserves (R. 574, 583, 595, 617). Despite the testimony of Robison that he was in constant consultation with Denby concerning the leasing of Reserve No. 3 (R. 586-8, 590) and that Denby and himself worked over the rough and final drafts of the lease (R. 590, 595, 614), Fall on April 12, 1922, deemed it advisable and necessary that he should

write Denby a long explanatory letter, in which he carefully recited the terms and conditions of the lease and the circumstances surrounding its execution (R. 287-9). Added significance is given to this letter by the fact that this was the very day on which Denby is supposed to have signed the lease (R. 614).

When Representative Mondell visited Denby, on or about April 20, 1922, seeking information with regard to the executed Mammoth lease of April 7, 1922, the latter referred him to Robison as the one who was familiar with the lease and its provisions (R. 395). It was at this time that Senator Harreld received a letter from Denby stating that the Navy Department was not in a position to give the details of any leases on the Naval Petroleum Reserves executed after May 31, 1921, but that accurate details as to such leases could only be obtained from the Interior Department (R. 404-5).

It should here be pointed out that appellants give a wrong impression in quoting language used by the Court of Appeals with respect to the mere naked legality of what was done as if it were a fact finding that Denby took part in the negotiation and making of the lease. The Court of Appeals discusses the Government's contentions against the legality of the lease at pages 811-16 of the record. **It is not there dealing with the contentions concerning fraud at all.**

In this discussion of legality the Court of Appeals does indicate that Denby did take enough part in the making of the lease and contract to save them

from the condemnation that they were made by the Interior Department rather than by the Navy Department as required by law. Thus it is said (R. 815):

> "We conclude that enough control was exercised by the Secretary of the Navy through Admiral Robison to preclude a court from holding that the entire power granted by the Act of June 4, 1920, to the Secretary of the Navy had been assumed by the Secretary of the Interior."

But when it comes to the findings with respect to the negotiation of the lease and to the frauds committed by Fall, the Court of Appeals equally clearly finds that Denby was passive and did not have any personal part in the transactions. Thus the court finds (R. 819):

> "So far as he was concerned the idea of opening Teapot Dome as a whole had not been considered or conceived. He never met Sinclair prior to the time of the signing of the lease. His part seemed to consist merely in consenting to the plans and purposes originating with Secretary Fall. Seekers of information were all directed to Secretary Fall."

Again it is said (R. 820):

> "Secretary Denby seemed to have so little information concerning the leasing of Teapot Dome that Secretary Fall thought it necessary to write him a long letter of date April 12, 1922, explaining the same. The evidence shows it was also explained to him by Admiral Robison before he signed the lease on April 12, 1922."

On the same page the court uses the language that:

> "* * * **Secretary Fall, as to this matter, dominated Secretary Denby,** * * *."

Referring to the matter of the execution of the lease the court finds (R. 820)

> "There seems to have been doubt whether it was necessary for the Secretary of the Navy to sign at all."

In the Pan American case, this Court found that Denby knew the terms of the contracts and lease. Our contention in this case is that he was deceived as to the necessity for this lease from the standpoint of drainage, and as to the method of negotiation.

7. Fraudulent prevention of bids by responsible companies.

A significant badge of fraud is the manner in which the lease and supplemental contract were negotiated by Fall. They were awarded without advertisement and competitive bidding and responsible bidders were denied an opportunity to compete for them.

Despite the fact that the leases made on the adjoining Salt Creek field by competitive bidding at auction on June 15, 1921, had netted the United States the sum of $1,687,080 in bonuses (Pl. Ex. 12; R. 298-9), and despite the fact that many inquiries were received from parties seeking a lease on Reserve No. 3, Fall nevertheless decided that competition was neither necessary nor advisable; and consequently the leasing of the reserve was never offered publicly (pp. 42-3, 57, *supra*).

Not only was the entire Teapot Dome reserve leased to Mammoth without any semblance of competition, but responsible parties were denied an opportunity to compete for the lease. We have referred in detail to the Producers & Refiners Corporation (pp. 43-44, *supra*), to the Texas Company (pp. 44-50, *supra*), and to the Texas Pacific Coal and Oil Company (pp. 50-52, *supra*).

It is not a question whether the law required competitive bidding for the lease, but it is a serious question whether a government official mindful of his obligations and desirous of doing the best he could for his government, ought ever to have let a contract in the secret and clandestine way in which Fall negotiated this lease. The inquiry becomes more pointed when we consider the methods he adopted to evade dealing with others than Sinclair, whom he had obviously picked out as the person to whom he was going to give the lease irrespective of any considerations of the government's interest.

8. Fraudulent reservation of sub-leases on Teapot Dome by Fall.

The testimony is uncontradicted that Fall privately arranged with Sinclair for acreage in the Reserve for John C. Shaffer and Gerald Hughes. Neither of them had any placer mining claim on the Reserve (pp. 52-55, *supra*).

Counsel cannot justify the Shaffer deal by any argument that Shaffer had any right or claim of right in the Reserve. He was simply in the category of a

person who was desirous of getting a lease on the Reserve if leases were to be granted. Counsel make no reference whatever to the extraordinary testimony which shows without contradiction that Fall, for some reason undisclosed, had arranged with Sinclair to set aside certain acreage for Gerald Hughes, a lawyer in Denver, Colorado. This transaction in and of itself casts a sinister light upon the private and secret dealings of Fall and Sinclair.

We submit, moreover, it is no answer for counsel for appellants to say, as they do at pages 142-44 of the Mammoth Brief, that whatever may be said about the Shaffer transaction, it remains that Shaffer got no acreage in the Reserve. The testimony was offered to show secret and fraudulent understandings and negotiations between Fall and Sinclair which were inexplicable on any theory of open arms' length dealing by an officer of the government in the government's behalf.

If, as counsel allege, the testimony with regard to the Shaffer matter affords no ground for an inference that Sinclair and Fall dealt on terms of intimacy, then we ask what inference is to be drawn from such secret and private dealings between a government officer and a contractor with the government.

9. Studied effort to avoid covering proceeds of royalty oil into the United States Treasury.

Robison was familiar with the Act of Congress of August 25, 1914 (38 Stat. 708) which provided that if royalty crude oil was sold, the money had to be covered

into the United States Treasury as miscellaneous receipts and would not be available without an appropriation by Congress (R. 636, 654). This fact was discussed and explained by Robison to Fall, Denby, Bain and Sinclair (R. 589, 616, 637, 689). **Everybody understood that in order to prevent the money being covered into the United States Treasury a plan had to be worked out whereby royalty oil should be given as a consideration for the storage of fuel oil in tanks and the building of fuel depots therefor** (R. 637).

Fall, Bain and Robison all knew that it was bad business to exchange royalty crude oil for fuel oil in storage and that it would have been a better business proposition to commute the royalty crude oil into cash and then buy fuel oil storage with it (R. 616, 689). Fall felt so strongly about the matter that on April 12, 1922, he forwarded to Denby a draft of a proposed amendment to the Naval Appropriation Act of that year, which amendment would have permitted the sale of royalty crude oil and the payment of the cash proceeds thereof for storage facilities, thereby avoiding the double profit necessarily involved in the exchange of royalty crude oil for fuel oil in storage (Pl. Exs. 8 and 8A; R. 290-92). This proposed amendment was discussed by Denby and Robison and was discarded because the latter relied on Doheny's promise to bid on the Pearl Harbor project (R. 617). Bain testified that it was discussed and agreed that they had no authority to buy and sell (R. 689); that if the royalty crude oil were sold,

the money had to be covered into the Treasury as miscellaneous receipts (R. 689); and that he did not like the "certificate" feature of the Mammoth lease because he felt it looked too much like a sale (R. 673-4).

Appellants' counsel completely ignore the ulterior motive of the parties in adopting and using these oil certificates and also the admitted financial loss thereby entailed to the Government. Nor do they mention Fall's proposed amendment to the 1922 Naval Appropriation Act which would have authorized the sale of government royalty crude oil and the payment of the cash proceeds thereof for storage facilities (R. 290-2). Their argument in this respect is that if the oil certificates should be redeemed in cash, the transaction would be a lawful sale under the Act of June 4, 1920. Such argument not only evades the fraud issue but also disregards the declared intention of the parties that such oil certificates were to be solely used for fuel oil and storage facilities (R. 637).

The opinion of this Court in the Pan American case clearly establishes the illegality of such a performance.

10. The $230,500 Liberty Bond transaction between Sinclair and Fall.

(a) *Fall receives Liberty Bonds.*

The record shows clearly and without contradiction that for some years prior to 1922 Fall and his son-in-law, one M. T. Everhart, owned, in equal amounts, all of the $10,000 par value of capital stock of a cattle company known as Tres Ritos Cattle and Land Company (R. 534). The company was evidently in

a very bad way. Up to May, 1922, there had been borrowed from the M. D. Thatcher Estates Company of Pueblo, Colorado, by this cattle company $10,000, for which the estates company held the cattle company's note (R. 538). In addition there had been borrowed by Fall from the same estates company $15,000, for which the estates company held Fall's note (R. 538). In addition, there had been borrowed by Everhart from the estates company $83,000, for which the estates company held Everhart's notes and the collateral notes of the cattle company (R. 538). For these indebtednesses there was pledged with the estates company the whole of the stock of the cattle company, which, as above stated, belonged equally to Everhart and Fall (R. 534; 538).

It is equally clear and uncontradicted that on May 29, 1922, M. T. Everhart appeared in Pueblo with $230,500 par value of First 3½% Liberty Loan Bonds (R. 533; 538). Of these he delivered to the First National Bank of Pueblo $90,000 par value, with directions to keep the same safely for Fall, and with the statement that they belonged to Fall (R. 533). $140,500 of them he sold at par and accrued interest to the M. D. Thatcher Estates Company on that day and applied the proceeds, so far as necessary, to wipe out the indebtedness to the estates company of the cattle company, of Fall and of himself (R. 538 9). The balance of the consideration received by him after the liquidation of the indebtednesses to the estates company was distributed between the cattle company, Fall and Everhart in sundry sums

(R. 538-9). Of the $90,000 of bonds held for Fall by the First National Bank of Pueblo, $20,000 of them were deposited to the credit of the cattle company and the remaining $70,000 were subsequently remitted to Fall and by him sold to a bank in El Paso, Texas, and a bank in New Mexico (R. 435-38; 533; 535-36; 539-42).

There is no possible doubt or controversy as to the serial numbers of these bonds. The $140,500 of bonds sold to the estates company were entered upon its books by the man who received them and he produced his books and testified to the numbers thereof (R. 538). This was corroborated by the interest coupons deposited by the estates company and forwarded through the First National Bank of Pueblo to the Federal Reserve Bank at Denver, and thence to the United States Treasury. These coupons bear the same serial numbers as the bonds from which they were detached and the numbers correspond (R. 440-41).

With regard to the $90,000 par value of bonds delivered to Fall the coupons from the same were detached and forwarded by the First National Bank of Pueblo to the Federal Reserve Bank at Denver and thence to the Treasury. These bonds were traced to the clerks who handled them and the clerks were called and identified their letters and records and the coupons themselves were produced from the Treasury of the United States (Pl. Ex. 116; R. 544-46; Pl. Ex. 121; R. 440-41).

But more than this, as above stated, Fall himself deposited $20,000 of these bonds at the First National Bank of El Paso, Texas, in October and November, 1922, and the bond numbers were noted upon the deposit tickets by the clerk who was called and identified the transaction. The numbers on these $20,000 of bonds correspond with the numbers on 20 coupons forwarded as above from the First National Bank of Pueblo (Pl. Exs. 109-11; R. 435-38). As to $50,000 of said bonds, they were deposited by Fall in May, 1923, with the Exchange Bank of Carrizozo, New Mexico, and the numbers noted upon the blotter by a clerk who was called to identify his entries and to verify the transaction (Pl. Exs. 144, 146; R. 539-43). These bonds corresponded in number with 50 of the coupons taken therefrom and forwarded as above stated by the First National Bank of Pueblo to the Federal Reserve Bank at Denver (Pl. Ex. 116; R. 544-46). As to the remaining $20,000 of said $90,000 of bonds, the uncontradicted evidence is that Fall sold them to the First National Bank of Pueblo and that bank sold them through a broker in Pueblo to a New York brokerage house, together with sundry other bonds owned by the bank. In said lot of bonds thus sold by the First National Bank of Pueblo, the numbers of 20 thereof correspond with the numbers of the coupons of 20 of said $90,000 of bonds which had, as above stated, been collected by the First National Bank of Pueblo through the Denver Federal Reserve Bank (Pl. Exs. 114, 119; R. 533-37).

There is, therefore, throughout a double check from independent sources of the numbers of the whole $230,500 of Liberty Bonds.

(b) *Attempted concealment of the source of the Liberty Bonds.*

Of course Everhart knew the source of these bonds. The Government called him as a witness. He refused to testify on the ground that he might incriminate himself (R. 537). The court was convinced by argument of Government counsel that certain questions asked him could not possibly raise any question of self-crimination and he was ordered to answer (R. 537). After some shilly-shallying, Everhart took a fresh tack and made the statement that he was concerned as principal in the transaction in which the bonds were received and that he feared he might incriminate himself by giving any testimony about it (R. 537). The court sustained his plea of self crimination (R. 537-38).

Of course Fall knew where the bonds came from. He was not called by the appellants.

Of course if the bonds did not come from Sinclair, or if Sinclair had no connection with the transaction, he could have stated that fact and, if innocent, would have been only too ready to testify. He was present throughout the trial but was not called.

The Government, however, had made a careful and exhaustive search of the prior ownership of these bonds and offered in evidence facts elicited by that search.

(c) ***The Continental Trading Co., Ltd., was the source of the bonds.***

The evidence in this case demonstrates without contradiction and beyond doubt that on April 13 and April 17, 1922, the New York Agency of the Dominion Bank of Canada, purchased from three brokerage houses in New York City United States $3\frac{1}{2}$% Liberty Loan Bonds of a par value of $300,000 (Pl. Exs. 141-43; R. 487; 489; 493-95; 497-99; 502-03; 568). The Dominion Bank did not keep a record of the numbers of the bonds so purchased. The brokerage houses which sold them, however, and the trust company from whom certain of them were obtained, did keep records of the numbers of $250,000 of said bonds so sold and delivered to the Dominion Bank. The records, the custodians of those records, and in all but one instance, the clerks who made those records were called to verify the same and the records themselves were offered in evidence. Approximately $200,000 of the $230,500 of bonds which Everhart produced at Pueblo on May 29th are among the known numbers of $250,000 of bonds of the $300,000 lot so purchased by the Dominion Bank on April 13 and 17, 1922 (R. 435-38; 440-41; 533; 535-46).

But why or for whose account did the Dominion Bank purchase these bonds? The officers of the Dominion Bank supplied the answer to this question. They testified that they bought them for the account of the Continental Trading Company, Ltd. (R. 485-91), a Canadian joint stock company whose president was H. S. Osler, a Barrister of Toronto, Canada

(R. 504-05). They testified that some months prior thereto Mr. Osler procured the said Dominion Bank, New York Agency, to act as a sort of fiscal agent for the Continental Trading Company, Ltd.; that from time to time Dominion Bank received remittances of cash through New York banks from Sinclair Crude Oil Purchasing Company and Prairie Oil and Gas Company and that upon instructions from Mr. Osler said bank from time to time made remittances against the account of Continental Trading Co., Ltd., to Humphreys Mexia Company. The result of the difference between the receipts and disbursements for account of Continental Trading Company, Ltd., was a large cash balance to this account in said Dominion Bank, New York Agency (R. 485-87). From time to time, upon instructions of H. S. Osler, President of the Continental Trading Company, Ltd., the Dominion Bank purchased out of this cash balance surplus First 3½% Liberty Loan Bonds and took delivery of the same for the account of Continental Trading Co., Ltd. (R. 485-87; 489).

Pursuant to Osler's instructions in writing under date of April 11, 1922 (R. 486-87), Dominion Bank, New York Agency, purchased the said $300,000 of Liberty Bonds. On May 8, 1922, H. S. Osler called at the bank in person, took delivery of said $300,000 of bonds and receipted for the same as President of the Continental Trading Co., Ltd. (R. 487-88). In and around the month of May, 1922, Osler took down all told some $700,000 of these bonds (R. 487-89).

One's curiosity is aroused by such a peculiar method of business and when it is learned that in the period between February, 1922, and June, 1923, purchases and deliveries of such Liberty Bonds in excess of $3,000,000 were made, one's curiosity becomes sharper (R. 489).

When it is realized that no taxpayer is required to make any record of income received from Liberty Bonds and that they are therefore an even more secret and clandestine method of exchange than currency, one's wonder grows. When it appears from the record that the Continental Trading Co., Ltd., being a Canadian corporation and doing no business in Canada was required to file no returns whatever of its business in Canada and under the guise of a Canadian corporation elected to file no returns in the United States, one realizes even more fully that the transaction can be cloaked in utter secrecy so far as the corporation is concerned (R. 464; 481-85).

(d) *The genesis and purpose of the Continental Trading Co., Ltd.*

The answer to the curiosity aroused by the circumstances was supplied by the evidence in this record. Let it be understood at once that what is now to be detailed is detailed only and solely for the purpose of showing Sinclair's connection with the Continental Trading Company, Ltd., and of demonstrating that what Sinclair received from the Continental Trading Company, Ltd. (Liberty Bonds) was a ready and secret means whereby he could turn over property

to Fall without fear of detection. Let it be understood that the organization and purpose of the Continental Trading Company, Ltd., antedated any thought of Sinclair, so far as this record shows, of getting a lease on Teapot Dome. Let it be understood that the Continental Trading Company, Ltd., as such, had no connection whatever with Sinclair's dealing with the Government.

It remains to show what the Continental Trading Company, Ltd., was and how it operated. One A. E. Humphreys controlled two oil corporations, the Humphreys Mexia Oil Company and the Humphreys Texas Company, which owned large and valuable producing oil properties in Texas (R. 452). It is a fair inference that all of the large oil companies were anxious to get the production of oil from the Humphreys properties. As a result of some negotiation Humphreys was called to New York and there met H. M. Blackmer, Chairman of the Board of Midwest Refining Company (R. 442). This company is a subsidiary of the Standard of Indiana (R. 674; 676). The Standard of Indiana and the Sinclair Consolidated Oil Corporation, Mr. Sinclair's principal company, are equal partners in the ownership of the Sinclair Pipe Line Company and the Sinclair Crude Oil Purchasing Company (R. 153 54; 559 60; 676). The community of interest therefore between Blackmer, Sinclair and the Standard company is quite evident.

Mr. Humphreys came to New York in November, 1921, met Blackmer and a tentative deal was made

whereby Humphreys agreed to sell one-half of the production of his companies in Texas at $1.50 per barrel until there should be delivered under the contract 30,000,000 barrels of oil (R. 442-43; 452). When this arrangement had been made Humphreys sent for his attorney, ex-Senator Charles S. Thomas (R. 442; 452). Thomas came to New York, conferred with Humphreys, and then met at luncheon Humphreys, Blackmer, Sinclair and James E. O'Neil, President of the Prairie Oil and Gas Company (R. 442-43; 452). There was considerable discussion about the contract and it was finally suggested that in order to make it for an even amount it should be 33,333,333⅓ barrels (R. 433). There was a further discussion whereby Humphreys agreed that when all the oil had been delivered under this first contract at $1.50 per barrel, Prairie Oil and Gas Company and Sinclair Crude Oil Purchasing Company would continue to take one-half of the Humphreys production indefinitely, not at a fixed price of $1.50 per barrel, but at the posted field price current at the date of delivery, that is, at the market price paid in the field (R. 432-33).

On the following day, November 16, 1921, Humphreys and Thomas met, at Blackmer's room in a hotel in New York, Blackmer, Sinclair, R. W. Stewart, President of the Standard of Indiana, and James E. O'Neil, President of the Prairie Oil and Gas Company (R. 443-44, 452). After some discussion Senator Thomas indicated that he would prepare a contract covering the first transaction above

mentioned (R. 444; 452). He was told to make that contract to the Continental Trading Co., Ltd., as vendee of the oil (R. 444, 452). A question at once arose as to who the Continental Trading Co., Ltd., was,—Humphreys objecting that he would not make such a contract with a company of which he had never heard and whose financial ability he did not know. Humphreys stated that he would require some security or guarantee of this contract (R. 444; 452-53). Thereupon Sinclair and Stewart for the Sinclair Crude Oil Purchasing Company and O'Neil for the Prairie Oil and Gas Company stated that their companies would guarantee the contract on the part of the vendee (R. 444; 452-53). This was entirely satisfactory to Humphreys as he knew both companies and knew their financial ability. The contract was accordingly so drawn.

Blackmer stated that the President of the Continental Trading Co., Ltd., would be in New York on the following day to execute the contract on behalf of that company (R. 444).

Mr. Osler, a Barrister of Toronto, applied for the incorporation of the Continental Trading Co. Ltd., on November 16, 1921 (R. 463-76; 505). Its charter was granted November 17, 1921 (R. 463; 477). On November 17, 1921, Osler appeared and met the parties above mentioned in New York, bringing with him the seal of the Continental Trading Co. Ltd., and there executed the contract of purchase of oil at $1.50 per barrel above mentioned, from Humphreys (R. 445; 453). This contract appears in the record

at pp. 445-47. The guarantee of the vendee's performance, executed on that day, was executed on behalf of the Sinclair Crude Oil Purchasing Company "by H. F. Sinclair and R. W. Stewart for the Directors" and by J. E. O'Neil as President of Prairie Oil and Gas Company (R. 447-48). It is copied at pp. 447-48 of the record.

At the same time there was executed the second contract which the parties had negotiated whereby Prairie Oil and Gas Company and Sinclair Crude Oil Purchasing Company jointly agreed to take the Humphreys production after the first contract should have been fully fulfilled and provided said production was to be taken at the posted field price. Sinclair and Stewart executed that contract also for the Directors of the Sinclair Crude Oil Purchasing Company, but the proper officers of the company subsequently executed a copy thereof. This contract is copied in the record at pp. 448-51. Neither Sinclair nor Stewart was a director of the Sinclair Crude Oil Purchasing Company for whom they purported to act (R. 461); but, of course, they controlled that company because they were each respectively President of the Sinclair Consolidated Oil Company and Standard Oil Company of Indiana which owned the stock of Sinclair Crude Oil Purchasing Company half and half (R. 559-60; 676).

On the same day, November 17, 1921, the Sinclair Crude Oil Purchasing Company and the Prairie Oil and Gas Company jointly entered into an agreement with Continental Trading Co. Ltd., purchasing

in turn from Continental Trading Co. Ltd., the oil just purchased by it from the Humphreys Companies at an advance of at least 25c per barrel. The advance might be greater than 25c per barrel under the terms of that contract, but it could in no event be less (R. 454-56). By this contract they further assumed every obligation assumed by Continental Trading Co. Ltd., to the Humphreys Companies and indemnified and saved harmless Continental Trading Co. Ltd. from any damage or loss whatsoever by reason of that contract (R. 456). This contract is copied at pp. 454-56 of the record.

It stands admitted that the purpose and intent of this whole transaction always was that Sinclair Crude Oil Purchasing Company and Prairie Oil and Gas Company should run the gathering lines and take this oil direct from the Humphreys field, merely giving Continental Trading Co. Ltd. its profit in the transaction (R. 444; 455-56).

As a matter of fact the transaction was so arranged that Continental Trading Co. Ltd. was to pay Humphreys on the 15th of the month (R. 446); but was to receive its pay from Sinclair Crude Oil Purchasing Company and Prairie Oil and Gas Company on the 10th of the month (R. 456). Thus Continental would always before the 15th of the month have in hand the funds to pay Humphreys on that date as well as its 25c per barrel profit. It was not intended that Continental should, and in fact Continental did not do anything except collect and disburse once a month.

It should be added that the most extraordinary means were taken to conceal the personnel of the Continental Trading Co. Ltd. Under the Companies Act in Canada it is possible to organize a corporation which shall issue "share warrants" instead of issuing certificates of capital stock. These share warrants run to bearer. They have attached to them coupons for the respective dividends (R. 507-08; 525). Nobody by any inspection of any corporate or official record can discover who holds those share warrants. Such share warrants may be exchanged at the instance of the holder for certificates of stock, but it is the election of the holder and not the election of the corporation which causes such exchange to be made. It will thus be seen that there was no way possible for any outsider to discover who constituted the Continental Trading Co. Ltd. Osler testified and the record shows that there was no list of the stockholders (R. 464; 508). We shall refer hereafter to Mr. Osler's testimony more in detail.

It seems so obvious as hardly to need comment that this Continental Trading Company was rigged up by the men interested in this deal so as to enable them secretly and clandestinely to take a profit of 25¢ per barrel at the expense of their respective corporations. The corporations would pay at least $1.75 per barrel for the oil. The Continental Trading Co. Ltd. receiving that $1.75 would pay Humphreys $1.50. The difference or profit would be, and in fact was under the scheme, invested in 3½% Liberty Loan Bonds (R. 489) in the belief that no human

ingenuity could trace their receipt or disbursement. In order to put the matter one step further from discovery, the Continental Trading Co. Ltd. carefully abstained from having anything or doing anything in Canada (R. 463-64; 481-85) and had all of the remittances made not by check but by bank exchange in New York City through the Dominion Bank of Canada, New York Agency, which acted as fiscal agent for Continental and thus enabled Continental to get along without keeping any books of account whatever at any point.

(c) *Sinclair's connection with Continental Trading Co., Ltd.*

As above stated, Osler drew down $300,000 of Liberty Bonds of specified numbers on May 8, 1922 (R. 487-89). As above stated, on May 29, 1922, Everhart appeared in Pueblo with $230,500 of the self-same bonds (R. 533; 538).

In the light of these facts, the natural course for anyone to pursue would be to ask Osler what he did with the $300,000 of bonds. Government counsel therefore applied for leave to take Osler's deposition at Toronto. Leave was granted on September 4, 1924 (R. 116-19). Osler appeared before the commissioner and flatly refused to testify to anything, claiming that the matter was one of professional privilege. The commissioner directed him to answer. He persisted in his refusal. The matter was certified to the Canadian courts. Then it was discovered that Osler was making technical objections to the form

of the commission, etc. To meet this Government counsel applied for a new commission to comport with what Osler contended were the technical requirements of Canadian law. The new commission was granted on October 18, 1924 (R. 116-19). Osler was again called.

This time he made long evasive statements calculated to throw all the doubt possible upon Sinclair's connection with Continental Trading Co. Ltd., without saying that Sinclair had no connection with it. When categorical questions were put to him he took refuge in his alleged claim of professional privilege. It was developed that this matter was purely a matter of business, that he was the president of the company, that all of its officers were clerks in his employ, that it had no books or records, that it had gone out of business, that he was under the seal of secrecy not to disclose either who his original client was in the matter or who that original client's associates were. All of this occurred only when objection had been made to the original commission and after a new commission had been issued to overcome his technical objections (R. 504-33).

The commissioners, upon demand of Government counsel, ordered him to answer the questions and refused to recognize any professional privilege attaching to him in his purely business capacity as president of the corporation. Osler refused again to obey the commissioners' orders. The matter was taken into the courts. Canadian counsel were retained and argued the matter before the courts. Upon argu-

ment, the court of the first instance on December 13, 1924, sustained the government's position and ordered Osler to answer (R. 205-6). An appeal was taken from this order. On account of the delay caused by Osler's contumacy the Trial Court at Cheyenne was requested to continue the case to enable counsel to get Osler's testimony. The court on December 26, 1924, did postpone the trial for this purpose, saying that counsel were entitled to have this testimony (R. 133-38).

The hearing on said appeal was heard on February 9 and 11, 1925 (R. 206); but the decision on appeal was delayed so that it did not appear to Government counsel that Osler's testimony could be taken in time to be presented at the trial, which was then fixed for March 9, 1925. Accordingly, on February 26, 1925, counsel applied to the court for a continuance of the cause (R. 138-99). The Trial Court completely reversed its former position and, having before it exactly the same matters it had in the previous December, now decided that nothing material could be obtained from Osler, refused to continue the case and ordered the government to go to trial on March 9 (R. 199-205). On March 11 the Court of Appeal of Ontario affirmed the decision below ordering Osler to give the testimony (R. 206). Before that time Osler had left Canada and was absent from Canada in foreign parts until sometime after the conclusion of the trial (R. 139; 184; 207).

Early in February, 1925, in a final effort to make some party to the negotiations of the Continental

Trading Co. Ltd., contract at New York tell the story Government counsel took out letters rogatory to take the testimony in France of H. M. Blackmer and James E. O'Neil, who, for some unaccountable reason, were both sojourning in France for indefinite periods (R. 546-48). A special messenger was sent to France with the commission; Blackmer and O'Neil were brought before a French court and the interrogatories attached to the letters rogatory were propounded to them and they answered by sepulchral silence (R. 546-48). Under the law of France they need give no answer unless they chose to do so, and they chose to make no answer whatever. Accordingly the letters rogatory were made up and returned and opened at the trial in Cheyenne, disclosing nothing. (R. 546-48.)

Robert W. Stewart, the only other person present at the consummation of the Humphreys-Continental Trading Co. deal, and unaccounted for, was under subpoena for the trial of the case at Cheyenne January 6, 1925. When a continuance was obtained to March 9, 1925, a new subpoena was at once issued for him. For some unaccountable reason it was not served. When counsel learned that it had not been served upon him a new subpoena was issued for him and this new and second subpoena was not served upon him for the reason that he had left for parts unknown and did not return to America until after the trial had closed.

The story is not complete until it is stated that in May 1923 the Continental Trading Co. Ltd., which

had then received over $2,000,000 profit on its in-between contract and which stood still to realize over $6,000,000 more profit (R. 461), suddenly sold and assigned all its rights under its contract with the Humphreys companies to Sinclair Crude Oil Purchasing Company and Prairie Oil and Gas Company for the paltry sum of $400,000 (Pl. Ex. 126; R. 457-60).

Counsel for appellants give many reasons, quoting Mr. Osler, why this was perfectly proper and easily understood. To us these reasons are not convincing. If all the other arguments appellants' counsel advance as to why this was a perfectly fair contract and arrangement and as to why Sinclair, Stewart and O'Neil had no interest with Blackmer in the Continental Trading Co. Ltd., are sound, then it is indeed hard to understand why Blackmer, who by his superior skill had dealt these other gentlemen off the board to the extent of $8,000,000 profit, should suddenly repent and sell the remaining $6,000,000 of that profit to the companies of Sinclair, Stewart and O'Neil.

The contract of assignment is copied in the record at pp. 457-60. The testimony of Mr. Phillips, President of the Sinclair Crude Oil Purchasing Company, who alleges that he negotiated this assignment with Osler, will be found by the Court most interesting (R. 457; 460-62). The real truth is, as disclosed by that testimony, that Phillips was a mere tool and was ordered to go to New York and buy the Continental Trading Company contract for $400,000.

He could not even remember who told him to go and buy it at that price (R. 461).

Shortly after this assignment the affairs of the Continental Trading Company, Ltd., were wound up (R. 480-81); and all records of the Company were subsequently destroyed in Mr. Osler's office (R. 506-07).

Of course anyone of the parties who kept their silence could by a word have cleared Sinclair of all connection with the matter. This applies to Everhart, Blackmer, O'Neil and Osler. It applies with double force to Sinclair. There is no suggestion that any of the other gentlemen concerned in the Continental Trading Co. Ltd., ever had any relations or dealings with Albert B. Fall. The suggestion that Mr. Everhart gratuitously should have gone to New York in May 1922 and picked up on the market $230,500 of Liberty Bonds for the account of Tres Ritos Cattle and Land Company, or Fall, or himself seems hardly admissible. The only man who at that time had dealings of great financial moment with Albert B. Fall as representing the government was Sinclair. If the transaction were an innocent one why did Everhart claim privilege against self-crimination? Why did all the others remain silent as the tomb?

We submit that the Court of Appeals was right in finding that the bonds in the possession of Everhart and used in part for Fall's benefit were received by Everhart either from Sinclair or the Continental Trading Co., Ltd.; and in being satisfied with Sin-

clair's connection with the Continental Trading Co., Ltd., and with the acquisition of the 3½% Liberty Bonds by Everhart and Fall (R. 846-7).

We strenuously urge that the long, laboring, technical aguments contained in appellants' brief in an effort to convict the Court of Appeals of having piled inference on inference is wholly beside the point. The Court of Appeals drew several plain, common-sense inferences from uncontradicted and unexplained facts. This we contend it had the right to do, and we further contend that for a court to shut its eyes to the plain implication of this trail of secrecy, chicanery and corruption would be to bring the courts into disgrace and, as the Court of Appeals puts it, would make of judges something less than men.

11. Sinclair admittedly delivers an additional $25,000 of Liberty Bonds to Fall.

We are not yet done with the dealings between Sinclair and Fall, nor have we concluded the demonstration that Liberty Bonds were favored currency when these two men were dealing with each other. We concede that a transaction by way of gift subsequent to an officer's leaving the government employ does not necessarily spell corruption between that official and the donor of that gift, but when what we are about to relate is added to what we have already outlined the transaction about to be detailed acquires new and startling significance.

Zevely testified that on behalf of Sinclair he went

to Three Rivers, New Mexico, in order to ask Fall to go to Russia as Sinclair's counsel in regard to certain controversies or applications for oil leases in Russia (R. 568). Zevely says he went way out there because he did not want to write Fall about it (R. 568-69). Fall finally stated that he could probably go, but that he could not go as early as Sinclair wanted to go and would have to follow him (R. 568). Fall explained, so Zevely says, that he was about to buy one or two small ranches in New Mexico and would need some money (R. 568). As a result of the discussion, it was arranged that Sinclair should let Fall have the money (R. 568).

On May 26, 1923, on a street in New York, Sinclair told his private secretary, Wahlberg, in the presence of Zevely "Wahlberg, Mr. Zevely may want $25,000 while I am gone. If he does, you give him Liberty Bonds for that amount" (R. 551). This conversation is corroborated by Zevely (R. 568). A week or ten days later Zevely asked Wahlberg for the bonds and the latter turned over to him $25,000 of U. S. Liberty First 3½% Bonds (R. 551). These bonds were taken from Sinclair's box but their numbers were not noted (R. 551). Fall was then in Washington.

About this time Fall wrote the First National Bank at El Paso (R. 114) saying that he was arranging to have $25,000 of Liberty Bonds forwarded from New York City, which were to be sold and credited to his account and that his son-in-law might draw against the proceeds not to exceed $2,500 (Pl. Ex. 144; R. 549). On June 5, 1923, Zevely wrote a cryptic letter

(Pl. Ex. 148; R. 549-50) to the First National Bank at El Paso saying he was forwarding "a package" to the bank which was the property of Albert B. Fall and asking the bank to acknowledge receipt. The bonds arrived and the bank wrote Zevely acknowledging the receipt of the "package" (Pl. Ex. 160; R. 550). The bonds were sold for $25,671.36 and the proceeds credited to Fall, and for practically a year thereafter they remained intact in Fall's bank account. They were not, in fact, drawn out for any such financial transaction as Zevely insists upon (R. 548-50; 568).

Before the Senate Committee on Public Lands and Surveys Zevely produced a note for $25,000 from Fall to Zevely (R. 568-70). He stated that he got this note from Fall to evidence the transaction after Fall returned from his European trip with Sinclair (R. 569). He did not say how long after. It is admitted that Fall has paid neither interest nor principal on this note (R. 569). Zevely says he holds the note in trust for Sinclair (R. 569). It stands admitted that no receipt was ever given to Sinclair for the bonds thus delivered to Zevely and sent to Fall (R. 569). It also stands admitted that Fall received a considerable sum in cash to cover his expenses and disbursements on this trip before he left for Europe (R. 569). Zevely also testified that the bonds were sent to Fall as a loan and not as a fee (R. 569).

What shall be said of this transaction when it is put beside the $230,500 transaction? What is said about it? Sinclair has not a word to say about it.

Fall has not a word to say about it. No court would ever have heard of it had it not been for the Senate committee's investigation. We submit that Judge Kennedy, the Trial Judge, was over generous in his characterization of these bond transactions as follows:

> "It may be admitted that the transaction arouses suspicion, but further than this the court does not feel justified in going toward a finding in favor of plaintiff, in view of the principles of law announced. This court feels that it must be left to some higher court to find from the evidence what seems to be fatal missing links or to extend the principles of law so as to cover a situation as it here apparently exists.
>
> "The other collateral transaction is the transfer of $25,000 in bonds from Sinclair to Fall in June, 1923, hereinbefore referred to. This may be regarded as a suspicious circumstance, but having taken place long after the transaction which is here challenged and the circumstances being explained, it is quite largely removed from the category of a fraudulent transaction in this suit" (R. 262).

He adds this bland comment, to which we can hardly agree:

> "It was done openly without any apparent attempt to conceal it" (R. 262).

The matter thus being left to a higher court, the Court of Appeals did not feel the same generosity towards the "open" and fair attitude of the parties to these transactions, but felt compelled to say (R. 838):

> "The entire transaction * * * bears the earmarks, either of a swindle of the stockholders * * * or a scheme to create a fund to be used in the way the Government claims the profits of the Continental * * * were in part used, viz., for a sinister and unlawful purpose or both."

And with regard to the Zevely "loan" the court says (R. 840):

> "Zevely's explanation of this affair is weak, wholly unsatisfactory, and evidently born of the exigencies of the situation."

D. THE LEGAL SUFFICIENCY OF THE PROOFS OF FRAUD AND CONSPIRACY.

1. The badges of fraud and conspiracy.

The foregoing enumeration of proved facts may be resolved into the following badges of fraud and conspiracy:

1. The policy of conserving the oil in the ground as long as possible, and of making only protective leases for offset purposes, was changed to one of exploiting the whole Reserve.

2. The policy of leasing only pursuant to advertisement and competitive bidding was changed to private negotiation.

3. In the private negotiations with Sinclair, competition for the lease, for the purchase of the royalty oil and for the erection of storage tankage was eliminated.

4. The quit-claiming of placer claims known to be invalid was made a condition precedent to a lease, and only Sinclair was given any practicable opportunity to secure the claims.

5. Applicants other than Sinclair for leases were told no leasing was contemplated or, as in the case of Beaty and Helms, were not given information on which a comparable bid could be made or time in which to make a bid.

6. Newspapers, the general public, senators and congressmen were denied information and affirmatively misled to avoid competition and opposition to the plan.

7. Negotiations were so shrouded with secrecy that even departmental subordinates did not know what was being done and did not know of the change in policy.

8. Subleases were clandestinely promised to two persons desirous of territory in the reserve .

9. The possibility of drainage was exaggerated and used as a justification for the lease, but not in good faith.

10. After doubts as to the legality of the plan were expressed by eminent attorneys, submission of the question to the Attorney General or Solicitor for the Interior Department was studiously avoided.

11. The lease was drafted in secrecy in the office of Sinclair's attorney.

12. Fall dominated the negotiations leading up to the making of the lease.

13. Sinclair bribed Fall with $230,500 worth of Liberty Bonds.

14. Neither Sinclair nor Fall were called by appellants to testify. Everhart claimed privilege against self-incrimination. Other witnesses with knowledge of important facts refused to testify.

15. Sinclair got a lease estimated to be worth in profits to his company over $33,000,000.

2. The test of the sufficiency of the proof of fraud.

Let us contrast the facts and circumstances of this case with the standard of action required upon the part of officers of the Government and those dealing with the Government. A public officer is held to the highest standard of good faith and good morals in all his transactions. He is not permitted to act from any motives other than the welfare and advantage of the Government. If motives of a private or a personal nature sway him, or if he is influenced by personal favoritism and offers preferential treatment to his friends, such action is immoral, reprehensible and renders voidable the transactions to which he thereby purports to bind the Government.

Persons dealing with a government officer are held to an equally strict standard of morality. They are affected with knowledge of the limitations upon the powers of a public officer and may not benefit in case the public officer exceeds his powers. They may

not do anything to influence the public officer to violate his duty to the Government. If they induce the public officer to act or merely know that he is acting from personal motives or from a desire to favor them and give them preferential treatment, they cannot enforce a contract so made. Personal solicitation which results in preferential treatment constitutes corruption and collusion, rendering voidable contracts made as a result of it.

Crocker vs. United States, 240 U. S. 74 (1915);
Hume vs. United States, 132 U. S. 406 (1889);
Garman vs. United States, 34 Ct. Cls. 237 (1889);
Washington Irrigation Co. vs. Krutz, 119 Fed. 279 (1902) (C. C. A. 9).

These cases were cited and relied upon by this Court in *Pan American Pet. & Trans. Co. et al.* vs. *United States.*

There is a marked contrast between the standard set up by the authorities and the negotiations in the present case. Personal favoritism, preferential treatment and evidence of corrupt motives crop out at every stage of the transactions.

If Sinclair knew or reasonably suspected that in awarding the contract to his company, Fall was actuated by any motives other than the procurement of the greatest advantage to the United States and the giving of equal opportunity to every would-be contractor, the resulting contract is fraudulent and unenforceable.

The collusion between Sinclair and Fall taints the entire transaction and neither the Mammoth Oil Company, nor any of the other appellants in this case is entitled to receive any benefit therefrom. We contend that the evidence in this case is ample to warrant the conclusion of corruption and fraud.

The particular type of fraud with which we are concerned in the present case is collusion between an agent and a third party dealing with that agent. The fraud consists of improper motives upon which the third party induces the agent to act and as a result of which the agent does act in whole or in part. This is a different type of fraud from that which exists when false representations are made by one party to another upon which the second party relies and which are not in accordance with the truth.

In fraud arising from false representations the representation is an objective fact, the proof of which is within the knowledge of the injured party. The true state of facts is also capable of objective proof, which proof it is usually not difficult to obtain. The only remaining element of proof necessary to establish the fraud is the knowledge of the falsity of the representation; and this can be established satisfactorily by proof that the person making the representation was familiar with the true state of facts at the time the false representation was made. It is clear that fraud of this type is more easily capable of proof than is fraud involving no objective representations. **It is this second type of fraud with which we have to deal in the present case.**

The gist of fraud that consists solely in collusion is the inducing to act on the one side and the action on the other side from improper motives. Most of the dealings take place between the conspirators who have a common interest to continue to conceal their actions and their motives. There are no representations to the injured party which can be laid hold of as a basis of objective proof. **The injured party must make up his proof out of a chain of circumstances which taken as a whole will show that the conspirators acted from improper motives.**

It is a very rare case when some one has overheard the conspirators or has been in any position where direct evidence can be obtained of their improper dealings with each other. This distinction is important because all proofs adduced should be judged in the light of proof that is possible. Legal pronouncements with regard to the kind and degree of proof required in a case of false representations should not be indiscriminately applied to a case in which the fraud consists of collusion.

When the proofs in the present case are examined in the light of proof that is reasonably possible, they are seen to be clear and convincing. The primary facts proved are substantially uncontradicted. There is no conflict in the testimony of witnesses as to the facts in evidence, nor is there any question as to the credibility of the Government's witnesses. The ultimate facts result from inferences arising upon the uncontradicted facts in evidence. **Those inferences depend principally upon the common sense knowledge**

of the motives and actions of men in circumstances like the present.

In this case, where only circumstantial evidence is possible, what principles shall guide the Court in making the inferences of ultimate facts? The Government contends for one set of inferences and the appellants contend for another. It is not necessary in this case, any more than it is in any other civil case, that the fraud should be established beyond a reasonable doubt. It is merely necessary that the court should be of the opinion that a reasonable man would infer from the facts proved that the transaction was fraudulent. These principles for which we contend are supported by authority.

Rea vs. Missouri, 17 Wall. 532, (1873).

The action was upon a bond which an execution plaintiff had given to indemnify the sheriff against the seizure of goods. The goods were levied upon as the property of Fuller and one Hayes laid claim to them. The position of the execution plaintiff, who was the defendant in the case, was that the title to the goods though in the name of Hayes was beneficially in Fuller and that the ostensible title had been placed in Hayes in order to prevent the creditors of Fuller from reaching the goods. This Court held that the court below, in its instructions to the jury, erroneously stated the law with regard to the strictness of proof of fraud in the case before it. At page 543, Justice Bradley, speaking for the Court, said:

"To establish fraud, it is not necessary to prove it by direct and positive evidence. Circumstantial evidence is not only sufficient, but in most cases it is the only proof that can be adduced. It was not necessary in this case, for the defendants, in order to maintain the issue on their part, to prove by direct and positive evidence, that Fuller had a secret trust or property in the goods. **It was sufficient if they proved such facts and circumstances tending to that conclusion as might reasonably induce the jury to believe that he had such trust or property.** The sufficiency of such circumstantial evidence was not, in our judgment, properly presented to the jury; but, on the contrary, the manifest tendency of the charge was to give them the impression that evidence of a more positive and direct character was required."

Glaspie vs. Keator, 56 Fed. 203, (1893) (C. C. A. 8).

Keator and Son sued below to recover damages for collusion between their agent St. John and Glaspie, who they alleged colluded to misrepresent the value of certain timber lands and thereby fraudulently to induce Keater and Son to purchase them. The court upheld a verdict for the plaintiff below against the contention that there was no evidence of fraud in the case. At page 205 the court said:

"* * * And we also think that there was proof of some facts and circumstances from which a jury might legitimately infer that Glaspie, the plaintiff in error, had acted in concert with St. John, and had knowingly aided and

abetted him in said scheme. In this class of cases, direct proof of a fraudulent intent or a fraudulent conspiracy is not to be expected, because such proof is rarely obtainable. Fraud is generally established by circumstances, and it very frequently happens, in cases like the one in hand, that slight circumstances will warrant important inferences."

Drake vs. Stewart, 76 Fed. 140, (1896) (C. C. A. 8).

Here suit was brought for a conspiracy between Stewart, the Marshal of Jackson County, Missouri, and one Bloss to detain plaintiff illegally in jail without bail. There was evidence that Bloss had seen Stewart before the arrest was made and that Bloss had prevented the plaintiff from getting in touch with a Justice of the Peace before whom a bail bond could be executed. Finally when a bond was executed and was presented to Stewart's deputies they refused to accept a bond. The court, speaking through Judge Sanborn, held that the facts constituted sufficient evidence of conspiracy to go to the jury. At page 144, Judge Sanborn said:

"• • • The fact that Stewart testified that he did not know who the parties to be arrested were, or upon what charge they were to be arrested, and that he found out nothing about it until the next morning, has not escaped our attention. The acts and the effects of the acts of a defendant often point to the truth as unerringly as his testimony, and this testimony of the defendant must be considered by the triers of the

fact in the light of the surrounding circumstances, and the acts of his deputies. In view of the legal presumption that these deputies received their instructions from their principal, and were acting by his command; in view of the fact that Bloss thought it necessary to the success of his plan that he should have a conversation with Stewart, in which he notified him that parties were to be arrested that evening, and that no straw bond should be taken, before he entered upon the execution of his enterprise; and in view of the significant fact that this conversation seems to have had the exact effect that the joint assent of the minds of Bloss and Stewart to the execution of the former's plan would have had,—we are unwilling to say that reasonable men might not fairly draw the inference that Stewart consented to this enterprise, and gave the instructions to his deputies to take no bonds, in order to assist in its prosecution. This question should have been submitted to the jury."

Drennen vs. Southern States Fire Ins. Co., 252 Fed. 776, (1918) (C. C. A. 5).

A suit in equity was brought by the receiver of the American Mortgage and Loan Company against the Southern States Fire Insurance Company and others on the ground that various common officers and directors of the two corporations had so conspired together and with others that the assets of the corporation for which plaintiff was receiver had been fraudulently diminished. The facts were exceedingly involved and the proof consisted of a long series of complicated financial transactions, no one

of them necessarily fraudulent in itself, but many of them open to suspicion. The appellate court reversed the district court on the ground that a case of fraud warranting equitable relief had been made out. At page 793, the court said:

> "Appeals are made to the proposition that fraud must be proved, and not presumed. Fraud must be proved. So must any other fact relied upon for judicial action. That fraud is charged, however, is no reason for suspending the rules of logic in the administration of the law. If facts are established from which an inevitable inference is to be drawn, the conclusion will not be rejected because the conclusion is fraud."

Cases to the same effect are:

> **Attorney General vs. Pelletier, 240 Mass. 264, 312, 314, (1922);**
> **Lumpkin vs. Foley, 204 Fed. 372, 381, (1913) (C. C. A. 5);**
> **Ware vs. United States, 154 Fed. 577, 580, (1907) (C. C. A. 8);**
> *(Certiorari denied* 207 U. S. 588);
> **Castle vs. Bullard, 23 How. 172, 187, (1859).**

We have shown that a high standard of morality, fairness and good faith is required on the part of government officers. We have seen that those dealing with government officers are held to an equally high standard of fairness, morality and good faith. We have shown that the evidence in this case proves collusion, corruption and fraud in the execution of the lease and contract in issue.

We have pointed out in our statement of the case that appellants seek to convict the Court of Appeals of error by alleging that that court placed its decision wholly and solely on the ground of bribery. We have pointed out from the record how erroneous is this position of appellants. We again repeat that there is ample evidence of fraud and collusion between Fall and Sinclair in this case, if no word of testimony had ever been introduced concerning the bond transactions. By this statement we by no means admit that the proofs adduced concerning bond transactions between Fall and Sinclair were irrelevant. Nor do we admit for one moment that that proof is not competent to move the mind of a chancellor and should not be effective to move his mind to find just what the Court of Appeals did find from that evidence, to wit, that Sinclair paid these bonds to Fall as a bribe. On the contrary, we aver that that evidence was competent and persuasive, and as we have heretofore argued, any court which refused to give it weight and to base a decision upon it would have to do so upon the theory that courts are not entitled to draw reasonable inferences from undisputed facts.

3. The silence of Sinclair is evidence of fraud.

The Government has contended in both the courts below, that the suspicious circumstances which it proved derived additional weight from the failure of Sinclair to take the stand. The Trial Judge admitted the principle that a party or an agent of a party who has facts peculiarly within his knowledge, and who

fails to take the stand and testify to those facts, thus creates the inference that if disclosed they would tell against him heavily (R. 261).

The Trial Court, however, asserted that there were no facts in this case which were laid at the door of Sinclair (R. 261), and that the rule was therefore inapplicable. The Trial Court in this connection discusses the Continental Trading Company transaction, but fails entirely to mention the many curious and vital personal transactions between Fall and Sinclair which occurred in the negotiation of the lease and contract. These we have heretofore detailed, and we shall not advert to them again in this section of the argument.

The Trial Judge further sought to escape the application of the principle by restricting it to cases where sufficient proof has been introduced to sustain a *prima facie* case without the indulgence of the inference (R. 261). We contended in the Court of Appeals that any such restriction is erroneous and illogical. The Court of Appeals agreed with this view and held that the silence of Sinclair was an important fact in the case (R. 842-45).

We submit that it cannot be otherwise. If by *prima facie* is meant a case sufficient to warrant a decree in favor of plaintiff, then no inference need ever be drawn from silence. By hypothesis a case is made out without the inference. If on the other hand *prima facie* means something less than the degree of proof necessary for a decree, but means something more than mere suspicion, which the Trial Court admitted

is present in this case (R. 262), then we have a metaphysical distinction without definiteness of application, and which sets no standard of practical availability to aid a trier of facts. We submit that the trier of facts should examine the whole case and weigh the proofs with reason and common sense, rather than with metaphysical refinements. This course is the course which the Court of Appeals followed.

The silence of Sinclair is a fact in this case. It is a fact to be considered not only in connection with The Continental Trading Company transaction,—but also in connection with the negotiations for the lease and contract. Sinclair's silence is to be weighed in connection with his visit to Fall's home at Three Rivers, at the end of December, 1921, and with his curious appearance on the scene as the man of opportunity just prior to his offer of February 3, 1922.

It is to be weighed in connection with his undue intimacy with Fall as further revealed by their many private conferences, their private "deals" over acreage for Shaffer and Hughes and their private arrangement for the purchase and tender of the Pioneer and Belgo placer mining claims.

The silence of Sinclair must be weighed in connection with the unusual and unique character of the entire negotiations between Fall and the man with whom he, as a government official, could deal in any honest way only at arms' length.

Finally, but coincident with the unusual and suspicious chain of other circumstances, is Fall's

proved accession of wealth from a source, which reasonably narrows down to less than half a dozen men, of whom Sinclair was the only one shown to be then having dealings of any sort with Fall.

The weight to be given to the silence of a party to a cause is a matter of common sense rather than the result of a metaphysical concept. If no suspicious facts are proved, obviously no adverse inferences arise from the silence of a party. **In direct proportion as the number and curious coincidence of suspicious facts increase, so also increases the weight to be given to a party's failure to explain such of those facts as are peculiarly within his control and knowledge.**

Judged by this common sense standard there is much in the present case calling for an explanation from the chief actor therein on the part of the appellants. The failure of Sinclair to take the stand and offer an explanation is a circumstance which colors the other circumstances of the case. The trier of facts should realize that honest men accused of fraudulent and criminal practices yearn to vindicate themselves. In reaching a decision as to the motives that actuated Sinclair and Fall, the Court of Appeals gave that weight to the silence of Sinclair which from its experience as to the motives of mankind, and with regard to the circumstances of this case, such silence merits.

The courts adopt the common sense theory of the inference to be drawn when a party refuses to produce testimony that is peculiarly within his control.

Bilokumsky vs. Todd, 263 U. S. 149, (1923).

Plaintiff had been examined, as provided by statute, in deportation proceedings under a warrant of the Secretary of Labor. When questioned as to alienage he stood mute and would not answer. Thereupon a prior statement made by him to an inspector of immigration was introduced in evidence as tending to show his alienage. After an order for deportation, plaintiff brought *habeas corpus* proceedings, which resulted in a denial of the writ. Upon appeal to this Court, the District Court was affirmed. The appellant contended that the statement was obtained in violation of his constitutional right against incrimination and unreasonable searches, etc. Except for this illegal evidence, plaintiff contended there would have been no evidence on the essential issue of alienage, as to which the burden of proof was with the United States.

This Court held that even granting the foregoing premises, there would have been sufficient evidence of alienage through the fact that the plaintiff had stood silent when interrogated.

> **"Conduct which forms a basis for inference is evidence. Silence is often evidence of the most persuasive character"** (citing Runkle *v.* Burnham, 153 U. S. 216, 225; Kirby *v.* Talmadge, 160 U. S. 379, 383) (p. 153).

Bilokumsky vs. *Todd* has been cited by this Court with approval in United States *vs.* Commissioner of Immigration, No. 111, October Term, 1926, not yet reported. In that case Mr. Justice Stone cited with

approval the language of this Court delivered by Mr. Justice Brandeis in the Bilokumsky case.

Runkle vs. Burnham, 153 U. S. 216, (1894).

Suit was brought upon a contract which had been made by defendant's alleged agent and which plaintiff asserted the agent had authority to make at the time he purported to execute it. There was a question in the case as to whether an old power of attorney was still in existence and whether, if not, it had been revoked by a new one. Runkle, the defendant, failed to take the stand himself, or to offer any testimony on this issue. This Court affirmed a judgment for the plaintiff. Justice White, in delivering the opinion of the Court, said at pages 225-6:

> "• • • If the new power of attorney was sent, and revoked the one relied on here, Runkle or his attorney could have dispelled all doubt by offering it in evidence, or by testifying as to its contents. **Their silence must necessarily make against them on the question of revocation.** Mansfield, *J.*, in Holdane v. Harney, 4 Burr, 2484, 2487. The doctrine that the production of weaker evidence, when stronger might have been produced, lays the producer open to the suspicion that the stronger evidence would have been to his prejudice was expressly adopted in the case of Clifton v. United States, 4 How. 242."

Pennsylvania R. R. Co. vs. Anoka National Bank, 108 Fed. 482, (1901) (C. C. A. 8).

An action was brought against the Pennsylvania R. R. Co. for the loss of goods in transit. The

goods had been transported over the line of the Pennsylvania as far as Baltimore, but from Baltimore they were transported over the Philadelphia, Wilmington and Baltimore Company's line, and it was while in the hands of that company that the goods were lost. Plaintiff introduced a large mass of circumstantial evidence to show that the Pennsylvania R. R. Co. was liable for the loss because of its relations with the Philadelphia, Wilmington and Baltimore Company. Defendants introduced no testimony as to what the relations were. The court held that this failure was to be considered along with the other evidence in the case. At page 486, the court said

> "* * * The defendant company, of course, knew exactly the relation it sustained to the Philadelphia, Wilmington & Baltimore Company, and, if it was not such as the mass of testimony introduced by the plaintiff strongly tended to show it to be, it was open to it to produce convincing evidence of the fact, and show precisely what the relation was; and, not having done so, every inference warranted by the evidence may justly be indulged against it. Where the evidence tends to fix a liability on a party who has it in his power to offer evidence of all the facts as they existed, and rebut the inferences which the proof tends to establish, and he refuses to offer such proof, the natural inference is that the proof, if produced, instead of rebutting, would support the inference against him."

Missouri K. & T. Railroad vs. Elliott, 102 Fed. 96, (1900) (C. C. A. 8).

(*Affirmed without opinion* 184 U. S. 695, 1901.)

Action for death of railway employee in a head-on collision. Plaintiff sought to show that defendant railroad had issued conflicting orders as to the movement of the two trains. Defendant failed to produce upon demand the train time sheet, or original dispatcher's record. Plaintiff, therefore, put in secondary evidence as to these conflicting orders. After verdict and judgment for plaintiff, defendant appealed and assigned as error the fact that the secondary evidence sought to be introduced was incompetent and insufficient to sustain the judgment. The court affirmed, holding there was no error in giving credence to the evidence introduced, **particularly as defendant had failed to produce available evidence, and thus given ground for a presumption that if such evidence had been produced, it would have supported plaintiff's case.** The court said (p. 102):

> "It is a well-settled rule that when the evidence tends to prove a material fact which imposes a liability on a party, and he has it in his power to produce evidence, which from its very nature must overthrow the case made against him, if it is not founded on fact, and he refuses to produce such evidence, the presumption arises that the evidence, if produced, would operate to his prejudice and support the case of his adversary. 'It is certainly a maxim,' said Lord Mansfield, 'that all evidence is to be weighed according to the proof which it was in the

power of one side to have produced, and in the power of the other side to have contradicted.' Blatch v. Archer, Cowp. 63, 65."

Glaspie vs. Keator, 56 Fed. 203, (1893) (C. C. A. 8).

The Court remarked upon the fact that the defendant was not called as a witness to refute any of the allegations of fraud (p. 206), **and stated that this was a matter to be considered along with the other evidence in the case.**

Hansel vs. Purnell, 1 Fed. (2nd) 266, (1924) C. C. A. 6).

(*Certiorari denied* 266 U. S. 617)

This was a suit in equity in which the relief prayed for was based upon a charge of fraud. The proof of fraud rested upon circumstantial evidence and there was considerable conflict in the evidence introduced. The Circuit Court of Appeals felt that the failure of the defendants, Benjamin Purnell and his wife Mary, to testify was a circumstance to which considerable weight should be attached. At page 273 the court says:

"* * * In addition to the testimony actually heard by the trial court, the fact remains that, although Benjamin was specifically charged with the commission of these criminal acts and Mary was specifically charged with criminal relations with at least one officer of the colony, nevertheless neither of these defendants took the witness stand to deny the truth of these charges. **This is a civil action, and the failure of a party to testify to**

facts peculiarly within his knowledge, or to call witnesses within the jurisdiction of the court to contradict evidence of conversations had with them or in their presence, is a circumstance that cannot be overlooked."

Attorney General vs. Pelletier, 240 Mass. 264, (1922).

This was an information to oust Pelletier from the office of District Attorney. Charges included those of collusion with one Coakley and others in practices constituting malfeasance in office. The evidence adduced consisted of a long chain of circumstances, and Pelletier neither took the stand nor offered any explanation thereof. Chief Justice Rugg, in delivering the opinion of the court, said, at p. 316:

"The respondent did not testify. He called no witnesses. He offered no evidence. He rested at the conclusion of the evidence introduced by the informant. There was ample evidence introduced by the informant tending to prove that the respondent was guilty of many of the charges set forth in the information. This evidence, if believed, constituted abundant proof of malfeasance and misfeasance in office arising from motives utterly unworthy of an upright man. The case shown by the evidence vitally affected the official conduct and personal character of the respondent. Instant impulse, spontaneous anxiety and deep yearning to repel charges thus impugning his honor would be expected from an innocent man. **Refusal to testify himself or to**

call available witnesses in his own behalf under such circumstances warrants inferences unfavorable to the respondent. It is conduct in the nature of an admission. It is evidence against him. This principle of law has long been established and constantly applied. **The reason is that it is an attribute of human nature to resent such imputations. In the face of such accusations, men commonly do not remain mute but voice their denial with earnestness, if they can do so with honesty. Culpability alone seals their lips. The law simply recognizes the natural probative force of conduct contrary to that of the ordinary man of integrity."**

Cases to the same effect are:

United States vs. *Carter, 217 U. S. 286, 315-7 (1909);*
The New York, 175 U. S. 187, 204-5 (1899);
Kirby vs. Talmadge, 160 U. S. 379, 388, (1896);
One Buick Automobile vs. *United States, 275 Fed. 809, (1921) (C. C. A. 8);*
Hill vs. *United States, 234 Fed. 39, (1916) (C. C. A. 8);*
Gulf Ry. Co. vs. *Ellis, 54 Fed. 481, 483, (1893) (C. C. A. 8);*
Hyams vs. *Calumet & Hecla Min. Co., 221 Fed. 529, 540, (1915) (C. C. A. 6);*
Weed vs. *Lyons Pet. Co., 294 Fed. 725, (1923);* (*Affirmed* 300 Fed. 1005) (C. C. A. 3);
Nelson vs. *City of New York, 131 N. Y. 4, 13 (1892);*
Keller vs. *Gill, 92 Md. 190, 196 (1900).*

4. The finding of bribery as one of the elements of fraud, is sustained by the proofs, and is not based on improper inferences or presumptions.

Appellants' only specifications of error to and complaints of the conclusion of the Court of Appeals that fraud and conspiracy to defraud were proved is directed to the sub-conclusion of the Court of Appeals that the competent and admissible evidence shows Sinclair bribed Fall with $230,500 face value of Liberty Bonds.

We have above demonstrated that this was but one of the elements of fraud involved in the case. Appellants, however, seek to make it appear that it was the sole basis of the adverse finding of the Court of Appeals.

They claim that this sub-conclusion of the Court of Appeals is an inference based upon rebuttable inferences and presumptions. The following facts with respect to the bond transaction are proved by direct and uncontradicted evidence.

1. Continental Trading Company was organized in Canada for a single American transaction on November 17, 1921, the day on which the Mexia oil sale contracts were signed in New York City.

2. No record was kept of the stockholders of the corporation, and bearer coupon share warrants were issued in lieu of stock.

3. It was organized for an undisclosed client and his associates.

4. Its single American transaction was concluded in the presence of and participated in by Sinclair.

5. Continental Trading Company stood to make approximately $8,000,000 on this transaction by a concurrent deal with Sinclair's company and another company.

6. This transaction was negotiated by Blackmer for himself and **associates.**

7. Sinclair for his company and Stewart for his company guaranteed that Continental Trading Company would perform its obligations.

8. The profits of Continental Trading Company aggregating $3,080,000 by May 26, 1923, were invested in First Liberty 3½% Bonds, some $700,000 being so invested in and around the month of May, 1922.

9. Continental Trading Company received on May 8, 1922, $300,000 of face value of said issue of bonds $250,000 of which are identified by serial numbers.

10. On May 29, 1922, Everhart, son-in-law and business associate of Fall, was in possession of $230,500 face value of such Liberty bonds, $200,000 of which are identified by serial numbers and are the same bonds which Continental Trading Company received as above.

11. Everhart used $140,500 of the bonds to pay debts of the cattle company owned by Fall and himself, and personal notes of Fall and himself and the

remaining $90,000 of the bonds were deposited to Fall's account in a bank with a statement by Everhart at the time that they belonged to Fall.

12. Everhart claimed privilege against self-incrimination and refused to state whether he was in the east during May, 1922, or from whom or how he acquired the bonds; and stated he had never been connected officially with the Mammoth Oil Company, or Sinclair.

13. Osler, President of Continental Trading Company, stated he was told by his client who the latter's associates were; but claimed privilege as an attorney and refused to testify who the associates were or whether Sinclair was one of them and refused to testify whether Liberty Bonds were distributed as dividends.

14. Of the four men present on behalf of the purchasers at the time the Humphreys deal was negotiated, O'Neil and Blackmer were in Europe when the case was assigned for trial and at the time of the trial and refused in the Letters Rogatory to state whether they or Sinclair had any interest in the profits of Continental Trading Company. A subpoena was issued for Stewart at his business address but was returned by the marshal, endorsed as not found. Sinclair was present throughout the trial but was not called to testify.

15. On May 26, 1923, with an assured $5,000,000 profit yet to accrue under its Humphreys contract,

Continental Trading Company assigned the contract to Sinclair's company and the other guarantor for $400,000.

16. Shortly after May 26, 1923, Continental Trading Company surrendered its charter.

17. All records of Continental Trading Company were destroyed.

18. There is no evidence that O'Neil, Blackmer or Stewart had any business dealings with the Government or Fall in or about May, 1922, when Everhart showed up in possession of the bonds.

19. Fall was not called as a witness.

20. On April 7, 1922, Sinclair's company received a lease of the whole of Teapot Dome, marked with the badges of fraud enumerated hereinbefore (*supra*, pages 134-36).

21. On May 26, 1923 (the date of the assignment by Continental Trading Company of the Humphreys contract to Sinclair's company and the other guarantor), Sinclair, contemplating an early departure for Russia on business, engaged Fall as counsel to follow and meet him over there. Fall said he wanted $25,000 to purchase land. Sinclair instructed his private secretary, Wahlberg, to let his attorney, Zevely, have upon request $25,000 in Liberty Bonds. Zevely requested the bonds, which were taken from Sinclair's box and forwarded to a bank as a package for Fall's account. Fall realized $25,671.36 for the

bonds. No note was given until after Fall returned from Russia. The note was sometime thereafter given payable to Zevely for $25,000. There is no evidence of any payment of interest or principal. The money was not used to purchase land and was not used until about February 1, 1924. Fall received $10,000 as expense money for the trip.

In approaching its finding of fraud and corruption, the Court of Appeals conceded the law to be, as appellants contend, that fraud and conspiracy to defraud must be established by clear, unequivocal and convincing proof and that it must be the only conclusion which can fairly and reasonably result from the circumstances proved (R. 817). After reviewing the facts and circumstances surrounding the negotiation of the lease and contract and also the bond transactions, the Court of Appeals said as to the charge of bribery (R. 838):

> "The really determinative question, therefore, as to this branch of the case is: Are the reasonable inferences and presumptions legitimately and properly to be drawn from **all the facts and circumstances** disclosed in the evidence sufficient to supply the so-called missing link?"

The Court of Appeals then adverts to certain facts previously discussed, such as that Sinclair received a valuable lease through Fall's efforts and unfair manipulations, that an intimate relationship existed between them, that Sinclair arranged at Fall's suggestion for acreage in the Reserve, that Liberty Bonds were used to cover a loan by Sinclair to Fall in May,

1923, and that many logical witnesses for the defense were not called, and finally concludes (R. 846-7):

> "**While no isolated fact, circumstance, or presumption in the case and no particular inference may be sufficient to establish Sinclair's connection with the receipt of bonds by Fall or Everhart, yet, taking the entire record of what was done, and all the inferences properly to be drawn therefrom,** the fact is sufficiently established that the bonds in the possession of Everhart and used in part for Secretary Fall's benefit were received by Everhart either from Sinclair or the Continental Trading Company, Limited. That company, we have pointed out, is shown to have been the agent of Sinclair, Blackmer, O'Neil and Stewart. Its assets consisted principally of Liberty Bonds. These assets were delivered to the shareholders, as Olser's letter shows. If by direct evidence it appeared that Sinclair was the owner of certain Liberty Bonds, which afterwards appeared in Secretary Fall's hands, in view of all the circumstances of this case, a court could not escape the conclusion that Sinclair had transferred them to Fall. The only difference here is that the bonds were the property of an agency in which Sinclair was interested, and in some manner reached Everhart and Secretary Fall. Is a court to say that because none testified as to the actual transfer of the bonds, a fatal missing link in the evidence exists. We conclude not. **The reasonable, proper, and natural inferences and presumptions from the accrual of condemnatory incidents appearing in this record supply the so-called missing links in**

the testimony and satisfy us of Sinclair's connection with the Continental Trading Company, Limited, and with the acquisition of the government Liberty Bonds by Everhart and Secretary Fall. A trail of deceit, falsehood, subterfuge, bad faith, and corruption, at times indistinct, but nevertheless discernible, runs through the transaction incident to and surrounding the making of this lease. It should not receive the approval of the courts. **Our conclusion is that the Government has sustained its claim that the lease and contract were procured by fraud and corruption, and that they should be cancelled.''**

Appellants' contention that an inference or conclusion cannot be based upon a rebuttable inference or presumption must be limited in its application to rebuttable inferences and presumptions of law. This proposition must be limited to such inferences as that men are to be considered honest and faithful to their duties until some evidence is offered that the men concerned were not honest and faithful to their duties, that a man exercised ordinary care for his own safety and was not guilty of negligence until some evidence is introduced to the contrary, etc. The cases cited by the appellants are of this type.

Such is the case of *United States* vs. *Ross, 92 U. S. 281 (1875).* Ross claimed a fund in the United States Treasury as the proceeds of the sale of property belonging to him which had been seized by military authorities during war time. He was unable to prove his property was turned over to a Treasury agent and sold by him and the proceeds covered

into the Treasury. There was no proof that the fund was the proceeds of the sale of his property except by inference on inference that Government officers, who had seized the property, performed their legal duties and turned it over to Treasury agents, who sold it and covered the proceeds into the fund. In the opinion it is said at page 283:

> "Such were the facts found; and from them the Court deduced, **not as a conclusion of fact,** but as a presumption of law, * * *."

and on page 284:

> "Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed."

Manning vs. *Insurance Company, 100 U. S. 693 (1879)*, cited by appellants was an action to recover agency commissions on renewal insurance premiums collected. The plaintiff proved what policies he had written which, if renewed, would have been in force at the time his agency was terminated but did not prove that the policies had been renewed or extended or that the renewal premiums were actually collected. He claimed that he should recover upon the inference that renewal premiums were collected and were still being collected from policies which he had written. In the opinion it is said (pp. 697-8):

> **"We do not question that a jury may be allowed to presume the existence of a fact in some cases from the existence of other facts which have been proved.** But the presumed fact must have an

> immediate connection with or relation to the established fact from which it is inferred. If it has not, it is regarded as too remote."

In *Looney* vs. *Metropolitan Railway Company, 200 U. S. 480 (1905)*, which was an action for damages for personal injuries, the plaintiff proved as a fact that the injury occurred but offered no evidence to establish the negligence of the defendant. The Trial Court directed a verdict for the defendant, and on appeal, this Court refused to infer negligence on the defendant's part from the mere fact that the injury occurred, saying (p. 486):

> "* * * But, on the other hand, plaintiff must establish grounds of liability against the defendant. To hold a master responsible, a servant must show that the appliances and instrumentalities furnished were defective. A defect cannot be inferred from the mere fact of an injury. There must be some substantive proof of the negligence. Knowledge of the defect or some omission of duty in regard to it must be shown."

The inference upon which the plaintiff relied was based upon a presumption of law and not upon a proved fact; and the case is not an authority against appellee.

But proved facts and circumstances, although disconnected, may support an inference or conclusion involving intermediate inferences and conclusions of fact. Unless this were so a very large portion of cases which must be proven, if at all, by circum-

stantial evidence would fail. And almost invariably, fraud and conspiracy cases must be proven by circumstantial evidence. The oft repeated statements of courts that a wide latitude must be allowed in the introduction of evidence and circumstances in fraud and conspiracy cases would otherwise be practically valueless.

The Court of Appeals considered the badges of fraud and the proved facts respecting the bond transaction, as above enumerated; and held that the proved facts pertaining to the bond transaction lead fairly, reasonably, clearly, unequivocally and convincingly only to the conclusion that Sinclair bribed Fall with the $230,500 worth of Liberty Bonds. That inference and conclusion is not based upon any rebuttable inference or presumption of law. In so far as it is based upon sub-inferences and conclusions of fact it is sustainable under the authorities.

Cooper vs. United States, 9 Fed. (2d) 216, (1925) (C. C. A. 8).

Cooper and another were convicted of conspiring to defraud the United States of its revenues by filing false income and excess profits tax returns of a corporation of which they were officers. On appeal from conviction, a new trial was granted because of errors of the court in refusing charges requested and in incorrectly instructing the jury. Circumstantial evidence was relied upon and the charge of the trial court upon the establishment of a conspiracy by circumstantial evidence was approved in the following language (page 224):

"Upon the subject of conspiracy, as indeed in most other particulars, the charge of the court was exceptionally clear and comprehensive. Conspiracy was excellently defined. It is practically always established by circumstantial evidence, **and this method in no sense amounts to the building of one presumption upon another.** The attack upon this ground is a novel one, which, if indulged, would grant immunity to conspirators in nearly all cases. The jury was told that the evidence on the whole must not only be consistent with defendants' guilt, but must fully and fairly exclude every reasonable hypothesis of their innocence."

Dimmick vs. United States, 135 Fed. 257, (1905) (C. C. A. 9).

Dimmick was convicted of the larceny of money from the United States mint in San Francisco. On appeal, the conviction was attacked on the ground that the circumstances were so disconnected as to have no probative value tending to show Dimmick was the person who committed the theft. The Court of Appeals in affirming the conviction says (p. 264):

"There was ample testimony given at the trial tending to show that the money of the government was stolen from the mint, and that Dimmick was the person who committed the theft. A conviction based on reasonable inferences which the jurors had the right to draw from the evidence cannot be set aside as unsupported by evidence. **In establishing the facts in this case the prosecu-**

tion did not 'rely solely upon inferences, presumptions resting upon the basis of another presumption,' as repeatedly claimed by the plaintiff in error, but independently proved by a chain of facts the essential elements necessary to be proven. It is true, as stated in Wills on Circumstantial Evidence, 283, that every circumstance not clearly shown to be connected as its correlative with the hypothesis it is supposed to support must be rejected from the judicial balance. But as recognized by the author, when it is distinctly established that there exists between the *factum probandum* and the facts which are adduced in proof of it, a real connection 'either evident and necessary, or so highly probable as to admit of no other reasonable explanation,' the proof becomes sufficient."

Among the circumstances held to have been correctly admitted was evidence that the defendant was continuously in debt during the time of his employment at the mint until after the theft was discovered. On this point it was said in the opinion (p. 266):

> "It is proper to state, in relation to these questions, that the existence or nonexistence of motive is immaterial where the guilt of the accused is clearly established, but although not an essential element it may throw some light on the intent with which the act was committed, and, as a matter of evidence, is frequently an important element in the case of the prosecution. Pointer *vs.* United States, 151 U. S. 396, 414, 14 Supreme Court 410, 38 L. Ed. 208."

State vs. Fiore, 85 N. J. L. 311, (1913).

The defendant was tried and convicted as an accessory to a murder. The claim made by the State was that the victim's wife, who in a separate trial had been convicted of murder in the first degree, had administered poison to her husband which caused his death; and that although the poison was administered when the defendant was not actively nor constructively present, yet the crime was induced by his counsel and advice, whereby he became an accessory to the murder.

The record of the conviction of the wife was offered and admitted. Such record was held *prima facie* evidence that the murder was in fact committed by the defendant's principal. Testimony was admitted tending to show illicit relations existing between the defendant and his principal.

Testimony as to what was said in a conversation between the wife and her daughter under the following circumstances was admitted. The defendant being in prison requested the wife to come and see him but she sent her daughter. The daughter testified that the defendant instructed her to tell her mother to poison her husband and that if she did not he would kill her when he got out of jail and that she told this to her mother. This was held competent and admissible evidence.

Testimony of a chemist concerning the contents of a box containing rat poison found in an alley near the deceased's home was admitted as some evidence of the contents of a box of rat poison which

the wife had purchased and possessed at the time of the poisoning. On page 320 of the opinion it is said:

> "**The next point relates to the refusal of the Court to charge as requested, that in 'considering the evidence in the case the jury may draw inferences from facts which have been proved, but must not draw inferences from other inferences.'** The subject is dealt with at considerable length in 1 Wig. Ev., Sec. 42, and need not be here repeated. In *Perkies vs. Hauxstert Land Co., 51 Vroom 369, 377*, this Court held that a course of practice by one acting as agent would justify an inference that the employer knew of it, **and from this inference of knowledge, coupled with continuance of agent's acts, a second inference could be drawn, namely that the employer had not forbidden it and had actually consented to it.** It is proper to say that in this case counsel does not point out in his proof any foundation for this request and so far as we are able to discover none exists, but even if it does, there was no error in refusing the request as made."

Hinshaw vs. State, 147 Ind. 334, (1897).

Hinshaw was convicted of murder in the second degree on circumstantial evidence. In the opinion affirming the judgment it is pointed out that although the circumstances are disconnected the conclusion does not amount to building inference on inference. Each circumstance was said to add weight to each of the other circumstances and from all the circumstances including an obviously fabricated story by the defend-

ant and his failure to call one witness who could have disproved the motive to which the circumstances pointed, the guilt of the defendant was an unavoidable conclusion. It is said in the opinion (pp. 362-3):

> "These circumstances taken in connection with all the others increase the strength of the others immensely, and they in turn increase the strength of these. All these circumstances, and all others brought to light by the evidence surrounding the homicide, in the language of the author from which we have quoted, 'so tally and confirm each other, as to leave no doubt of the fact they tend to establish,' namely, that no person was present when the homicide was committed, except appellant and his wife. **This process of tallying and confirming each circumstance by the others does not infringe the general rule that one inference cannot be based on another. There is an important exception to that rule, however. A fact in the nature of an inference may in itself be taken as a basis of a new inference, whether intermediate or final, provided the first inference has the required basis of a proved fact.** Burrill Cir. Ev., p. 138; Best on Pres., Section 187; 1 Greenl'f. Ev., Sec. 34. In short, it is not merely the sum of the simple probabilities created by the numerous individual circumstances pointing to and indicating the absence of burglars and all other human beings than appellant and his wife at the scene of the murder but is the compound ratio of them all tallying with and confirming each other that made them all strong enough when considered together as to fully justify the jury in believing and finding that no

> burglars and no other human beings than appellant and his wife were present when she was shot; from which they had a right to conclude to a moral certainty that appellant committed the murder."

One of the circumstances relied upon was the proved fact that blood was found on a window sill. An expert testified that it was blood from an animal of the mammalian family and that it was consistent with human blood. This evidence was introduced to tally with the State's theory that the defendant, after killing his wife and inflicting wounds on himself, went to the window on which the blood stain was found to throw out his pantaloons, razor, pocket-book and revolver to the places where they were respectively found and in so doing blood dropped from his wounds onto the sill. The objection to the competency of the evidence was that it permitted the jury to first infer from the fact that it was mammalian blood that it was human blood and from that inference that it was the appellant's blood and from that inference that it fell from his wounds that night. The court stated in answer thereto (p. 369):

> "Counsel cite many authorities to the general rule that an inference cannot be based on a mere inference. But counsel are entirely wrong in assuming that by the admission of that evidence the Court either impliedly or otherwise so instructed the jury. The blood stain was a mere circumstance in and of itself of little or no importance; especially was it of no importance unless there was evidence, circumstantial or

otherwise, authorizing the inference that it was dropped there that night. Evidence that it was there before, or was placed there after that night, would render it of no value whatever. But the blood stain was there and it was consistent with and might have been human blood. The first step was to prove that fact. However small its force alone it might become important by the addition of the proof of other circumstances.

* * * * * * *

"If there was no circumstance in evidence that connected the blood stain with the fatal tragedy that night, then we are bound to presume that the jury had intelligence enough, under proper instructions from the Court, to assign no weight or significance to it and hence there was no error in its admission."

Wigmore on Evidence, 2nd Edition, Vol. 1, Sec. 41:

"Circumstantial Evidence May be Proved by the Same Kind. It was once suggested that an 'inference upon an inference' will not be permitted, *i. e.*, that a fact desired to be used circumstantially must itself be established by testimonial evidence; and this suggestion has been repeated by a few Courts, and sometimes actually enforced. There is no such rule; nor can be. If there were, hardly a single trial could be adequately prosecuted. For example, on a charge of murder, the defendant's gun is found discharged; from this we infer that he discharged it; and from this we infer that it was his bullet which struck and killed the deceased. Or, the defendant is shown to have been sharpening a

knife; from this we argue that he had a design to use it upon the deceased; and from this we argue that the fatal stab was the result of this design. In these and innumerable daily instances we build up inference upon inference, and yet no Court ever thought of forbidding it. All departments of reasoning, all scientific work, every day's life and every day's trials, proceed upon such data. The judicial utterances that sanction the fallacious and impracticable limitation, originally put forward without authority, must be taken as valid only for the particular evidentiary facts therein ruled upon."

E. THE ILLEGALITY OF THE LEASE AND CONTRACT.

1. Analysis of the lease of April 7, 1922, and the supplemental contract of February 9, 1923.

(a) *The lease of April 7, 1922.*

The preambles of the lease (which were written by Secretary Fall, R., 339, 591) recite **four objects** to be attained by the lease, as follows: (1) The duty resting upon the Government and the Government's desire to secure and store a supply of fuel oil and **suitable storage** for such fuel oil at points easily accessible to the Navy; (2) The Government's desire to avoid "in so far as possible **any risks** of loss of the supply of crude oil available for the United States Navy **by a reduction of gas pressure** resulting from the drilling and operating of wells located outside of Naval Reserve No. 3;" (3) The Government's desire to create a competitive market and secure the best

price for Government royalty oil from the Salt Creek Field; (4) The Government's desire to exchange its royalty oil from the Reserve for fuel oil and to secure **adequate storage facilities for the storing of such fuel oil as is received in exchange, over and above the requirements for use for the United States Navy** (R. 14).

It will be observed that all of these purposes and objects are recited as prime objects moving the Government to make this lease. They are all stated as of equal importance to the Government and as the moving causes, taken together and in conjunction, for the making of the lease.

Article I states the consideration to be given and received as single and entire on each side. The language is: "The lessor, in consideration of **royalties to be paid and the covenants to be observed, as hereinafter specifically set forth,** does hereby grant and lease to the lessee," etc. The article then states the demised premises in detail (R. 15-16).

Article II provides for the furnishing of a bond in $250,000 for the lessee "to proceed with reasonable diligence to begin operations for the drilling" of not less than twenty wells within 180 days from the date of the lease. It specifies the exact locations where these are to be drilled (R. 17-18). In its further clauses it provides for certain tests, and that if these tests show a total production of 20,000 barrels per day, then the lessee **"or its nominee"** shall within sixty days commence operations for constructing a pipe line of not less than 25,000 barrels

capacity, extending from the leased premises to the main pipe line operated by Sinclair Pipe Line Company or that operated by Prairie Pipe Line Company. The Article then provides for additional wells to be drilled if the first twenty do not produce 20,000 barrels, and further provides that when by the drilling of such additional wells the production shall reach 20,000 barrels the pipe line is to be constructed. It is to be noticed that the pipe line may be built by the "nominee" of Mammoth. It is reasonable to assume that the parties always had in mind the building of this pipe line, as it was ultimately built—by the Sinclair Pipe Line Company.

Article II further provides for royalties on a certain schedule or per cent. ranging from 12½ to 50% in the case of oil over 34° Baume; from 12½ to 25% on oil of less than 34° Baume. The royalty is to be computed, however, on the average production per well per day for the calendar month. This means that the higher royalty is not to be paid in the case of individual wells producing a certain number of barrels per day, but that all the production of all the wells is to be lumped together for the calendar month and that total production is to be divided by a divisor made up by multiplying the total number of wells by the total number of days in the month. Thus, for example, if there are ten wells producing respectively 1,000, 800, 600, 400, 300, 200, 100, 100, 50 and 50 barrels, or a total of 3600 barrels per day, these wells in thirty days would produce 108,000 barrels of oil. As there are ten wells and thirty days in the month,

this total should be divided by 300. This will give the average per well per day for the calendar month as 360 barrels. The royalty will be calculated then on the first fifty barrels for each well at 12½%, on the next fifty barrels at 16⅔%, and on the next 100 at 20%, and on the next 100 at 25%, and on the remaining 60 at 30%. It will thus be seen that the actual royalty will be between 12½ and 30%, or actually about 21½%. The royalty oil actually never reached in fact any higher figures in the schedule.

A very important provision of the same Article II appears at R. 24, under the sub-heading (e). It is:

> "The lessor agrees to, and does hereby, **sell to the lessee, and the lessee agrees to, and does hereby, purchase from the lessor all the royalty oil hereinbefore mentioned, as and when the same is produced by the lessee, so that the lessee shall take and have title to and possession of, and the right to dispose of all oil, as and when the same is produced. In payment for said royalty oil, and in lieu of the delivery in kind to the lessor, lessee agrees to set up an oil exchange credit to lessor therefor and to issue to the lessor, as evidence thereof, oil certificates showing the amount of said royalty oil taken by the lessee and the value thereof.**"

A further significant clause is: "The oil certificates above referred to shall be non-interest bearing and shall be in form substantially as follows," etc.

The provisions above referred to show as clearly as any language can that the transaction was intended to be and was in fact and in law a sale, and

that what arises on the delivery of the royalty oil is a **debt** from the lessee to the lessor. If no debt is created why was it necessary to provide that the certificates should not bear interest? The parties knew that if they did not so provide the law would imply an obligation to pay interest, as it does in every case of indebtedness from one person to another.

At R. 25 the form of oil certificates is given. Its language again is significant. It evidences in the first place the delivery by the Government to the lessee of oil of so many barrels, **"being of a cash value of $——."** It then provides for redemption in one of several ways, the first of which is:

> **"(a) As a credit upon, or for the extinguishment of any obligation to the maker hereof from the United States Government by reason of the construction of steel tank storage for the use of the United States Navy in the storing of fuel oil."**

Here again, in speaking of the construction of steel tank storage, the parties recognize that an **"obligation"** will be incurred by the United States for the erection of such storage. Can language be plainer as indicating that the construction of such storage **will create a debt** from the United States to the lessee who will construct such storage? What can the "obligation" of the United States mean except "indebtedness," and what can it mean to say that the amount of the certificate can be used as a "credit" against that obligation except to mean payment of indebtedness?

The certificate then in paragraph (*b*) (R. 25) provides that Mammoth will deliver fuel oil of Navy specifications upon "the exchange basis fixed" in the contract.

It further provides in paragraph (*c*) (R. 25) that Mammoth will sell gasoline, kerosene, lubricating oils and/or other petroleum products to the Navy, "the basis of exchange therefor and the conditions of delivery to be as mutually agreed upon in a separate contract" between the parties.

This clause is obviously illusory. No such contract was ever made, or if the supplemental contract of February 9, 1923, be taken to cover the matter we only have a delivery at market. It is to be borne in mind further, as will be hereafter more particularly pointed out, that this clause is wholly void and illegal for the reason that the United States has no power thus to buy by private contract, and without competition, supplies for the Navy.

Lastly, in paragraph (*d*) the certificate provides for its redemption by payment of cash to the United States (R. 25). This is only to be done under the conditions mentioned in the contract. We shall refer further to this matter, but it should be mentioned here that the redemption in cash both by the original contract and by the supplemental agreement **is made impossible unless and until certain storage construction is completed.** Besides, Admiral Robison testified without contradiction that it was always the intention of the parties, when the lease and contract were being discussed and made, that all of the oil certificates

should be used for fuel oil and other petroleum products and for tankage (R. 637). He further testified without contradiction that in order to avoid covering cash into the Treasury, he discussed with Sinclair, Fall and others the necessity of evolving and adopting a plan, whereby the royalty oil would be converted into fuel oil and storage without the use of cash (R. 637). So this clause is entirely illusory.

The agreement then goes on to state how these oil certificates "shall be redeemed" (R. 26-7). We need only again call attention to the fact that redemption of these certificates is another evidence that the parties meant to create and did create an indebtedness by lessee to lessor.

Beginning with the second paragraph on R. 26 occurs a clause on which appellants set great store. It provides that if and when requested so to do by lessor, lessee will construct or pay for the construction of steel storage tankage up to but not in excess of such amount as shall be estimated to be necessary or required for the storage by lessor of the fuel oil to be received by it as hereinbefore provided in exchange for royalty crude oil from the lands hereby leased.

It is contended by the appellants that this is a sort of option; that until exercised it is wholly innocuous; that it is severable from the balance of the lease. But we may as well point out here that it is a solemn covenant by the lessee and that it is an integral part of the consideration for the lease; that under all the

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evidence furnished not only by the lease itself, but by the testimony given by Admiral Robison, it was one of the main and salient features of the lease, and as Robison clearly pointed out, the lease would not have been made without it. It is not therefore severable from the balance of the lease, but if it is illegal the whole lease on which it is based and founded must fall.

At the bottom of R. 26 and on R. 27 the lease specifies the conditions upon which **"a portion of said certificates may be redeemed in cash."** A reading of that paragraph and of the language just quoted will show that there is a certain portion of the certificates which never can be redeemed in cash, but on the other hand must necessarily be used for storage. This again shows that the main purpose and object of the lease was to obtain the construction of storage and knits that object inextricably into the lease.

At the bottom of R. 27 and top of R. 28 are found the provisions for the delivery of fuel oil against certificates for crude oil and the ratio of fuel oil to be given for barrels of crude oil represented on the face of the certificates.

It is not necessary to analyze the balance of the lease, except to say that it vests solely in the Secretary of the Interior certain powers in Article II, paragraphs 5, 6, 7, 8 and 9 (R. 30), and that it vests in the Secretary of the Interior the sole right to approve a termination of the lease (Art. V, R. 34), and the sole right to consent to an assignment of the lease (Art. X, R. 35 36). These provisions were

inserted with the knowledge of Secretary Denby, who was desirous of them (R. 636).

(b) *The supplemental contract of February 9, 1923.*

This contract is designated "supplemental" to the lease (R. 36). It recites (R. 37) that the Government has requested Mammoth to construct storage tankage facilities as specified in Article I. It is therefore quite clear that the positive and absolute covenant of Mammoth to construct such storage facilities, appearing at R. 26, and contained in the original lease agreement, has now become effective by reason of the Government's demand.

In Article I, Mammoth agrees to construct four projects for the Government, beginning Project A immediately upon being furnished plans and specifications (R. 36-39), and beginning the other projects from time to time after the Government shall have accumulated a certain amount of oil certificates such as will justify Mammoth in starting the expense of the various projects (R. 39-42).

At R. 43-44 is a covenant that Mammoth will, upon the demand of the Navy Department, go on building storage after all the projects mentioned in the agreement are completed. The contract is therefore practically endless in its operation so long as royalty oil is received by Mammoth.

Article II, R. 44, provides for the filling of the tankage with fuel oil at the agreed rate. It further provides (R. 45, top) for the redemption of oil cer-

tificates by the purchase of various petroleum products at market price. Such contract is obviously illegal, as the Navy has no power to purchase such supplies except by competitive bidding. Art. II further provides that Mammoth may anticipate the filling of the tanks before oil certificates have accumulated necessary to liquidate the cost of the fuel oil.

Art. III, R. 48, defines the cost of the work to be done by Mammoth. No real conception of the scope of these provisions can be had except by reading them *in toto*. They are the most extraordinary provisions imaginable. They cover every kind of expense that Mammoth or its nominee may incur, even including legal expenses for attorneys and assistants, stenographic fees and expenses, share of officers' salaries, accounting and purchasing department salaries, etc., etc. In other words, if Mammoth (or, as in this case, its nominee, Sinclair Refining Company) does this work, a part of the salaries of officers whose time would otherwise be devoted to the refining business is to be paid by the Government. The possibility of abuse under such a contract hardly needs to be mentioned.

Article IV, R. 49-50, recognizes that the oil certificates really represent indebtedness and that it is a little too much to expect the United States to stand out of its money for perhaps months or years without interest, and it alters the original contract by making the oil certificates bear interest at the rate of five per cent. per annum, but it also calls for five per cent. interest to be charged against the Govern-

ment "on all unsettled balances due Mammoth" by the Government. These balances would consist in deferred payments for construction. See Art. III, R. 47-48.

Articles V, VI, VII, R. 50, provide for delays of work, designation by Mammoth of a nominee, and the application of bonds previously given to performance of this contract.

Article VIII, R. 51, states that the Government has elected to redeem such an amount of oil certificates in accordance with the terms of the supplemental contract, as shall be necessary for the full performance thereof. Until the supplemental contract has been fully performed the Government surrenders its right to have oil certificates redeemed in any other way.

2. Appellants' unwarranted construction of the lease.

The appellants insist upon severability with a vengeance. They not only attempt to sever the supplemental agreement of February 9, 1923, from the lease of April 7, 1922, but they repeatedly throughout their brief attempt to subdivide the said lease into two contracts, which they designate as the primary and basic contract or lease, and the collateral agreement disposing of the royalty oils. These they say are two independent contracts contained in one written agreement.

We shall hereafter under another heading deal with the legal question of severability. It is our purpose

here and now merely to point out that upon a construction of the agreement itself, and upon the admitted facts, this contention is unsound.

As above pointed out, the lease of April 7, 1922, is bilateral, covenants being made on both sides, and all of the Government's covenants are set over against all of the lessee's covenants as considerations moving each party to make its own covenants. On the part of the Government two main undertakings are made, (1) to lease at a certain royalty, and (2) to bargain and sell to the lessee the Government's royalty oil. On the lessee's part two main undertakings are made, (1) to operate under the lease and pay the royalty, and (2) to set up what the lease terms an "oil exchange credit" in favor of the Government, to be evidenced by certificates showing the royalty oil purchased and its value.

We presume appellants would hardly dare argue that the Government would have entered into the lease without the provision for the sale of royalty oils. It is quite likely that the lessee would not have entered into the lease on the terms of this lease without the right to buy the royalty oils. Certainly nobody can speculate with any certainty as to what either party would have done had either of these undertakings not been made by the other party.

But appellants assert that in connection with the oil exchange credit the lessee extended to the Government four independent options as to how the Government would require the lessee's indebtedness to it for royalty oils sold the lessee to be liquidated. It

is significant that every time this matter of the so called "options" is mentioned appellants state them in an order not set forth in the lease. They always state the first so called "option" of the Government as a right to receive cash.

A mere glance at the lease will show that by its very terms the Government cannot under any circumstances receive all of its consideration in cash. The very lease itself, in referring to cash, which it states as the last option, says (R. 26): "The conditions upon which **a portion of said certificates** may be redeemed **in cash** are as follows:". A mere reading of the balance of the paragraph will show that some of the oil exchange credit must be used for what the lease specifies as "steel tank storage."

The whole scheme of the lease clearly indicates that the first thing to be derived by the Government is steel tank storage to be built and filled with fuel oil by the lessee; that as to any of the oil exchange credit not so absorbed, it may be absorbed in gasoline or other petroleum products, and that only if there is some of the exchange credit left over and not used for any of the above, is it to be liquidated in cash.

A glance through the lease will demonstrate that the things for which the oil exchange credit is to pay are always mentioned in the following order: first, the steel tank storage; second, fuel oil; third, gasoline, kerosene, lubricating oils, etc.; and fourth and finally, cash, if there remain any of the credit not absorbed in the previous items.

The oil certificate itself (R. 25) states:

> "Upon the conditions stated in the contract * * * this certificate may be redeemed in cash."

No such certificates may be redeemed in cash until the Government's requirements for steel storage tankage and fuel oil shall have been satisfied.

This lease is to be judged as to its legality, we submit, by what the Government desired to accomplish by it, and the lease not only by its preambles, but by its covenants, and by all the testimony with regard to the purpose for its making, is definitely classified as an instrument which was intended to carry out the plan of building fuel depots on the Atlantic Coast and to accomplish the storage of fuel oil by the use of royalty crude oil produced under the lease.

Let us assume, however, although we do not for a moment concede it, that the fuel oil certificates could be redeemed, though the lease says they cannot, wholly in cash. Where do appellants find the authority in the Act of June 4, 1920, or any other act of Congress, for a department officer authorized to sell property of the Government to make that sale upon an interminable and non-interest bearing credit to the purchaser?

Concededly no redemption of any certificate can be made in cash unless, as the lease provides, the Government shall on or before July 1, 1923, or any July 1 thereafter, notify lessee what portion of the certificates it desires shall be redeemed in cash for the oil run in the succeeding calendar year (R. 26-27).

This means the Government will have no right to receive any cash for any oil run during the year 1923. It means that if it wishes cash for any part of the oil run during the year 1924, or any subsequent year, it must give six months' advance notice as to how it wishes the oil run in such succeeding year divided as between steel tank storage, fuel oil, gasoline, kerosene, etc., and cash. Meantime the Government's royalty oil is in the hands of the lessee on an open credit. We ask appellants to point to anything in any law of the United States which justifies any such performance as this.

The real truth is that the provision for cash was merely made as a catch-all at the end of the series, to be operative if and only if the Government should prove to be unable to use up all of the royalty oil as consideration for the building and filling of fuel depots on the Atlantic Coast.

3. The real purpose of the lease.

Appellants have had to adopt for the first time in this Court an entirely novel position with regard to the lease. In the opinion of Mr. Justice Butler in *Pan American Pet. & Trans. Co. et al.* vs. *United States*, it is said:

> "The grant of authority to the Secretary of the Navy did not indicate a change of policy as to conservation of the reserves. The Act of June 25, 1910, the Act of February 25, 1920, the Executive orders, and the Joint Resolution of February 8, 1924, show that it has been and is the policy of the United States to maintain a

> great naval petroleum reserve in the ground. While the possibility of loss by drainage might be a reason for legislation enabling the Secretary to take any appropriate action that at any time might become necessary to save the petroleum, it is certain that the contracts and leases have no such purpose. The work to be paid for in crude products contemplated the construction of fuel depots. * * * The record shows that the Navy Department estimated the cost of proposed storage plants and contents at approximately $103,000,000. Congress has not authorized any such program."

Prior to the above declaration counsel for the appellants in both the Pan American case and this case insisted that the Act of June 4, 1920, gave absolutely free and unrestricted power to the Secretary of the Navy to take all of the oil out of the Reserves if he in his unrestricted discretion thought that it was for the benefit of the United States so to do. Nay more, in the courts below counsel for the appellants argued vigorously that the act of June 4, 1920, constituted a mandate to the Secretary of the Navy, to take out all the oil and to take it out as fast as reasonably possible. They even went so far as to allege that the Secretary of the Navy had been negligent in not sooner making leases under that act which would exhaust the reserves.

And they insisted that such an intent on the part of Congress was shown not only by the appropriation of $500,000 for the purpose of storing fuel oil re-

ceived in exchange, but by an "oil appropriation" deduced from the use of the word "exchange," which appropriation of oil for storage purposes was limited only by the quantity of oil in the reserves. This contention this Court answered in no uncertain terms in its decision in the Pan American case.

Now counsel must shift their entire ground of argument. This they do. They suggest that the evidence in this case is convincing that there was serious drainage. They are careful not to say that the threatened drainage threatened all of the underground reserve. In fact they do not suggest how much was threatened. They content themselves by quoting certain opinions that some of the oil in the reserve would ultimately be drained by neighboring drilling.

We have above pointed out (this brief, *supra*, pp. 61-71) that at the time this lease was made there was neither immediate danger of drainage, nor expectation of drainage in the near future; that any leasing could have waited indefinitely; and that no person could say that serious drainage would ultimately occur. We have shown that in spite of this official information to Fall and Robison this lease was rushed through in indecent haste and in secret fashion by private negotiation.

In addition, we have above shown, and we have quoted the only testimony there is in this record on the subject (this brief, *supra* pp. 14-20), that

Robison and Bain both unequivocally state and believe that this lease was made solely for the purpose of providing fuel depots on the Atlantic Coast, for which Congress had not seen fit to appropriate, and for the obtaining for the benefit of the United States, as they deemed it, the construction of a pipe line to serve this donne and other territory of the United States not set apart for the use of the Navy (the Salt Creek field). We do not intend here to re-quote that testimony, but we earnestly urge the Court to turn back in this brief to pages 14 to 20, where at the very outset of our statement we have set forth verbatim the testimony and the only testimony on the subject of the real underlying purpose for the making of this lease.

The language of this Court in the Pan American case fits the facts and circumstances of this case as if it had been written for this case as well as for the Pan American. It is:

> "It was the purpose of those making the contracts and leases to circumvent the laws and defeat the policy of the United States established for the conservation of the Naval Petroleum Reserves. The purpose of the representatives of the Department was to get for the Navy fuel depots or storage facilities that had not been authorized by Congress. The leases were made to obtain the crude products for use as a substitute for money to make good the amounts advanced by petitioners to pay for such improvements."

4. The attempt to distinguish the Pan American case.

An ineffective attempt is made to distinguish the decision of this Court in the Pan American case. In the decision of that case this Court points out that the initial transaction was a contract whereby royalty oil then running to the Navy from Reserves Nos. 1 and 2 in California should be used to provide storage on the Pacific Coast. The Court will remember that on account of the ambitious building program of the Navy the royalty oil was insufficient for the purpose, and therefore the great lease there involved was made to get more royalty oil.

Counsel for appellants seize upon the fact and call attention to the fact that in the present case a lease was made in the first instance and the contract for storage was made after the lease became effective and the Government was receiving oil exchange credits under its terms.

There is not the slightest difference either in the purpose or the principle of the transactions. Admiral Robison frankly states that he considered the Pan American transactions had taken care of the need for reserve fuel depots on the Pacific Coast (R. 611; 637); that he then turned his attention to the Atlantic Coast and considered that the Navy's needs for fuel depots on that coast could be supplied from Teapot Dome (R. 611; 637).

But it must be observed that no royalty oil was running to the Navy at that moment from Teapot Dome. No leases had been made in Teapot Dome

under the General Leasing Act of February 25, 1920, as had been done in the California reserves. The Navy could never get any royalty oil to use as an exchange medium for tankage—fuel depots—unless and until it had made a lease which would create such royalty in favor of the Government.

Robison frankly states that this lease was made to take care of a national emergency (R. 584-86). By this he unquestionably means the provision of depots not authorized or appropriated for by Congress. He adds that the Government incidentally got another valuable consideration, the building of a pipe line through which Salt Creek and Teapot Dome oils could be run off (R. 584-89). But, be it observed, that merely advantaged the Government in the price paid by lessees. In other words, it made the Salt Creek oil perhaps somewhat more valuable. He also argues that the pipe line made crude oil more available for Navy use in case of a national emergency, i. e., made it more readily transportable to the seaboard for naval purposes and relieved railroads from transporting oil, and thus freed them for other emergency purposes in time of war.

Where, pray, is there to be found in the Act of June 4, 1920, any authority to bargain away by lease the Naval Petroleum Reserves of the United States for strategical purposes represented by a pipe line? How do appellants distinguish this sort of performance from that which this Court denounced in the Pan American case, saying:

"It is not contended that the clause confers unlimited authority, and the petitioners say that the word 'exchange' must have some reasonable limitation. But they insist that it is broad enough to authorize the contracts. If it is, there is no reason why crude oil may not be used to pay for any kind of construction work or to purchase any property that may be desired by the Department for the use of the Navy."

In view of the foregoing language do appellants contend that the Secretary of the Navy would have a right to exchange crude oil for the building of a pipe line just because a pipe line is for the benefit of the United States? If so, why do they stop at that point? Why is not our original argument made to this Court in point, that if they are to go this far, then the Secretary of the Navy may equally exchange crude oil for battleships or airplanes, which unquestionably may be of benefit to the United States.

Every element denounced by this Court in the Pan American decision is present in this case. The Atlantic Coast fuel depots were admittedly parts of the $100,000,000 fuel depot building scheme of the Navy (R. 429-30; 637). Robison admits that the $500,000 appropriated for building storage was wholly insufficient (R. 611). He admits that that $500,000 was used to build storage on the Atlantic Coast (R. 611). He admits that in addition he needed vast quantities of royalty oil from Teapot Dome to complete the building program on the Atlantic Coast. Indeed the supplemental contract itself shows a

scheme of building on that coast that would run into millions upon millions of dollars for fuel depots never authorized by Congress.

This Court in the Pan American case pointed out definitely that the Secretary of the Navy was not authorized to use without appropriation by Congress cash received for royalty oil. Such cash must under the provisions of the revised statutes be covered into the United States Treasury (R. S. 3617, 3618). What folly it is to suggest that the intent of the Government in the making of this contract was to receive cash which would have been unusable for the very purpose for which Teapot Dome was opened up.

5. The attempt to have this Court reverse its holding in the Pan American case.

The most remarkable argument made by appellants upon the legality of the lease and contract is a repetition of the argument already discarded by this Court, that the appropriation of $7500,000 contained in the Act of June 4, 1920, is no limitation upon the fuel depot building scheme, but that when that appropriation is exhausted the Secretary of the Navy may use royalty oil, or as they put it here, the "oil exchange credit," in lieu of an appropriation to build storage (Mammoth Brief, pp. 176-79). It ought, it seems to us, to be an answer to this argument to quote what this Court has so recently said in the Pan American case:

> "The Secretary's authority to provide facilities in which to 'store' naval reserve petroleum or its products did not extend beyond those that might be provided by use of the money made available by the Act of June 4, 1920."

Are counsel for appellants asking this Court to overrule what it has so recently and so clearly said? They put the same dilemma to the Court with regard to this matter as was put by counsel for the Pan American Company in their argument. They say, here was the lease made. Here was the royalty oil coming in to the Navy. If the Secretary had no place in which to store it what was the poor man to do? Must he not through necessity, through the medium of a so called exchange of royalty oil for tanks, get the fuel oil storage? Have they forgotten that Congress was in session? Have they forgotten that having had one appropriation it was their privilege to ask for another? Or do they realize as Robison realized, as Fall realized, that to ask for any such appropriation would raise the ghost of this whole outrageous dealing and bring Congress down in its wrath upon the perpetrators of this outrage on orderly government.

6. The alleged severability of the lease and contract.

In an effort to save to Mammoth Oil Company expenditures of approximately $1,000,000, appellants argue strenuously that even if the contract of February 9, 1923, was unauthorized because it was an attempt to do what this Court said in the Pan

American case was illegal, viz., to buy fuel depots with royalty oil, still the lease ought to stand as a lease, and only the contract of February 9, 1923, ought to be struck down. They argue that these two instruments are severable. The answer to this contention is found in the provisions of the lease itself.

The lease is one whereby, say the appellants, the United States reserved to itself several options. If perchance one of these options, *i. e.*, that to have storage built, proves to be illegal and void, then the United States may not denounce the contract, but it is bound to take those options which are lawful. Thus they say, let the United States take fuel oil in exchange, or let it take cash. Either of these would be perfectly lawful.

They seem entirely oblivious of the fact that this lease was made by officers of the United States who on its behalf purported to grant the lease on conditions and covenants made by the lessee as a consideration for that grant. One of those covenants was, and the officers who made the lease required that it should be, that the lessee upon demand would build steel tankage in exchange for the royalty oil. That was one of the conditions laid down as a cardinal condition of the making of the lease by Robison to Sinclair on the first occasion when Robison met Sinclair (R. 589; 627; 612). It is a new doctrine that when on behalf of a principal an agent makes a contract giving the principal certain rights, and the courts declare that certain of those rights reserved in that contract for the benefit of the principal are

illegal, that the principal is bound to carry out the contract albeit the principal cannot get those benefits stipulated for by his agent in that contract.

From the foregoing analysis of the lease and contract, we believe that this Court will conclude in this case, as it did in the Pan American case that:

> "The contracts and leases and all that was done under them are so interwoven that they constitute a single transaction not authorized by law and consummated by conspiracy, corruption and fraud."

The Court of Appeals said in the instant case (R. 810) that the supplemental contract was "inextricably interwoven with the lease."

Appellants cite a large number of cases dealing with illegal alternatives, which are wholly inapplicable. The classical instance evidenced by these cases is a contract between a municipality and an individual, whereby the municipality in consideration of certain things to be done by the individual agrees to grant certain rights to the individual. It turns out thereafter that the municipality acted *ultra vires* as to certain of these grants. The individual, upon discovering this fact, asserts that he is willing to go on and give to the municipality all the considerations stipulated in the original contract without requiring the municipality to make good to him all the grants made in the contract. Obviously if the grantee is willing to take part of that which he was to get for his consideration and still pay the municipality the

full consideration, the municipality cannot denounce the contract for illegality. The grants in such cases are treated as severable, and if the grantee is willing to take part performance the municipality cannot be hurt, because it is getting for part performance the whole consideration agreed to be given for full performance.

Such cases have no relevancy and no bearing upon such an issue as we have here. On the contrary the authorities are full and complete to the effect that in such a case as this it does not lie in the mouth of appellants to ask a court to rewrite the document and fasten upon the Government a lease wholly different from that which the officers of the Government attempted to make for it. Some of the authorities are:

Hazleton vs. Scheckells, 202 U. S. 71, (1906).

This was a suit for the specific performance of a contract to sell a piece of ground at an agreed price. The plaintiff was the purchaser under the agreement. The contract was in the form of an option running to the purchaser. Part of the consideration moving from the purchaser was services rendered by him in getting a bill through Congress to buy the land in question for public purposes. This consideration was illegal. The plaintiff could not have demanded a conveyance upon tendering the purchase price alone, and the seller could not have insisted upon the sale if the legislation had not been passed. Therefore, this Court said that the entire transaction

was void. Mr. Justice Holmes in delivering the opinion of this Court says at page 78:

> "**Every part of the consideration goes equally to the whole promise and therefore, if any part of it is contrary to public policy, the whole promise falls.** Pickering *v.* Ilfracombe Ry. Co., L. R. 3 C. P. 235, 250; Harrington *v.* Victoria Graving Dock Co., 3 Q. B. D. 549; Woodruff *v.* Hinman, 11 Vermont 592; Clark *v.* Ricker, 14 N. H. 44; McMullen *v.* Hoffman, 174 U. S. 639; Bishop *v.* Palmer, 146 Massachusetts 469, 474. According to the bill, and no doubt according to the fact, a part of the consideration was services, as we have quoted, and therefore it is not true, as argued, that the plaintiff could have demanded a conveyance on tendering the nine thousand dollars alone."

McMullen vs. Hoffman, 174 U. S. 639, (1898).

This was an action for an accounting under a partnership agreement. The agreement was in writing and on its face purported to provide for two construction companies sharing equally in the costs and the profits of a construction contract awarded by the City of Portland. The defendant showed that this written agreement was part of a larger agreement, a parol understanding, by which prior to the award of the contract, plaintiff and defendant were to put in bids known to each other, that fictitious bids should be put in without expectation or purpose of having them taken, and that if the contract were procured, they would perform the work as partners

in the partnership agreement. **The court held that the motives of the contract as thus disclosed were illegal and that no portion of the contract could stand in view of these illegal agreements.** The plaintiff wanted to prove and recover solely on the written contract which did not disclose any illegality. In holding that the contract was entire, this Court said that it was perfectly proper for defendant to introduce the parol portions of the contract in evidence, and that the Court must pass upon the entire contract as thus disclosed. Justice Peckham, in delivering the opinion of the Court says at pages 633-4:

> "The complainant cannot count only upon the contract of partnership as evidenced by the writing of March, 1893. That writing evidenced only a portion of the agreement that had been made between these parties, the result being that, although their agreement was in the first instance by parol, a portion of it was subsequently reduced to writing. The whole contract is none the less one and indivisible, just as much as if it had all been put in writing. If it had been, **it would scarcely be argued that complainant might maintain an action by relying on that part of it which was valid and relating to the partnership between them, and that he might discard or omit to prove that portion which was illegal.** If the complainant did not, the defendant could, prove the whole contract, as well the part lying in parol as that which was reduced to writing, so that the Court might, upon an inspection of the whole contract, determine therefrom its character. The unity of the contract is not severed or its meaning or

effect in any degree altered by putting part of it in writing and leaving the rest in parol."

See also:

Lingle vs. *Snyder*, 160 Fed. 627, (1908) (C. C. A. 8);

Western Indemnity Co. vs. *Crafts*, 240 Fed 1, (1917), (C. C. A. 6);

Townes vs. *Townes*, 270 Fed. 744, (1921) (C. C. A. 5);

Central Railroad of New Jersey vs. *United States Pipe Line Co.*, 290 Fed. 983, (1923);

Linebarger vs. *Devine*, 47 Nev. 67, (1923) (214 Pac. 532), (Affirmed on rehearing 217 Pac. 1101);

Orenstein vs. *Kahn*, 13 Del. Ch. 376, (1922) (119 Atl. 444);

La France vs. *Cullen*, 196 Mich. 726, (1917) (163 N. W. 101);

Williston on Sales, Vol. 2, Sec. 681, at pp. 1246-50;

13 *Corpus Juris (Contracts)*, Sec. 471, at pp. 513-14.

7. The making of the acquirement of the placer mining claims a part of the consideration was unlawful and voids the whole lease.

We have previously discussed the Pioneer and Belgo placer mining claims and the official reports thereon (pp. 71-74, *supra*). These claims were made the basis of various applications and proceedings before the Interior Department, the last of which were applications for leases under sections 18 and 18a of the General Leasing Act of February 25, 1920.

Those applications were denied by former Secretary Payne; and upon a petition for re-hearing, were again denied by Judge Finney. A petition for the exercise of supervisory powers by the Secretary of the Interior was then filed and was still pending before the Department.

The appellants in the courts below, stressed the fact that these claims were still in some form before the Interior Department at the time the negotiations for a lease with Sinclair were entered into and up to the time that the lease with Sinclair was closed. We were not able definitely to gather whether emphasis was laid on this fact by the appellants for the purpose of showing that these claims had to be dealt with, but we assume that that was their purpose.

If this be so, then we submit that there was a legal way to deal with these claims, and only one legal way so to do. The Act of June 4, 1920, by its very terms is inapplicable to any lands in the Naval Petroleum Reserves upon which there are pending claims for lease under the Act of February 25, 1920. The pending claims, if such there were in fact, could be recognized under no other act than the Act of February 25, 1920.

As to almost the entire area of Naval Reserve No. 3, therefore, the Act of June 4, 1920, could become applicable only upon the disposition of the applications for lease (see Sections 18 and 18a of the Act of February 25, 1920, 41 Stat. 451). The only lawful method of disposing of the pending applications, if they had any merit or any standing before the In-

terior Department after the Department's previous repeated action, was to hear them and either grant them or deny them. If they had been granted, then to the extent that leases were granted, the Act of June 4, 1920, would not have applied. If they were denied, then that action would have cleared the land definitely for leasing under the Act of June 4, 1920.

Fall elected to follow a wholly unauthorized and illegal method of dealing with these claims. He suggested to Sinclair that his proposition should include a surrender and quitclaim of all these claims to the United States; and he knew that Sinclair was dealing for them for a consideration of money or money's worth (R. 350, 656, 714).

Now it is quite clear that no lease under the Act of June 4, 1920, could be made for the lands covered by the pending applications under the Act of February 25, 1920, nor could any lease for the whole area be made under the Act of February 25, 1920, for the reason that Section 18 of that act forbids such a lease of greater extent than 3200 acres. Under the Act of February 25, 1920, the applicant for a lease must quitclaim his claims to the United States. When Sinclair tendered his quitclaim, therefore, he could have gotten a lease not in excess of the amount provided by Section 18 of the Act of February 25, 1920.

Nowhere does the Act of June 4, 1920, authorize the United States to give money or money's worth to a claimant to surrender his application for lease under the Act of February 25, 1920, or to surrender an al-

leged placer mining claim. Neither of the acts in question contemplate such a compromise and settlement with the United States, as was here made. Fall obviously could not have paid the money of the United States or given anything of value to the United States in settlement or compromise of these claims. He did this, however, by indirection rather than directly, by arranging that Sinclair should pay the money or the consideration to the claimants, and thus reduced the consideration payable to the United States under the Act of June 4, 1920, for a lease.

Fall's dealing with the placer mining claims and the applications for leases based upon them, was illegal in any aspect. The relinquishment of the claims was not a gift to the United States. Their surrender, as the testimony shows, was conditional upon the lease of the Reserve being executed to Sinclair's Company. Sinclair had agreed to pay one million dollars to the Pioneer and Belgo Companies for these placer mining rights (R. 346). Sinclair did not intend to be out of pocket that amount. He had arranged with the Pioneer and Belgo Companies that if he did not get the lease he would not have to pay. If he did get the lease, obviously he expected his reimbursement to come out of the oil produced from the property. Therefore, when Fall executed the lease and took as one of the considerations for it the surrender of the Pioneer and Belgo placer mining claims, the Government in substance and effect paid in oil for the surrender of the placer mining claims.

Payment in oil for claims of this sort was authorized by the Act of February 25th, 1920, provided the terms of that Act were complied with. This lease cannot be sustained under the Act of February 25th, 1920. It did not purport to be made under that Act. It violated the provisions of that act as to maximum acreage. It violated the provisions of that Act as to the disposition of royalty oil received by the United States. The dealing of Fall with the placer mining claims cannot, therefore, be sustained under the Act of February 25th, 1920.

Payment for the surrender of placer mining claims was unauthorized by the Act of June 4th, 1920. In fact, it was forbidden by that Act. The Act expressly attaches only to territory whereon no placer mining claims exist. Yet in making a surrender of the placer mining claims a condition and consideration for the awarding of the Mammoth lease, Fall did purport to make the Government pay for these claims. The transaction was illegal because wholly unauthorized by any law. It was harmful and detrimental to the Government because the consideration given by the Government was the right to take out oil from the lands. Just how much less royalty Sinclair offered by reason of the expenditure of one million dollars for these claims, no one is in a position to say. This uncertainty adds to the wrongful nature of the transaction.

We have shown that the dealing with the placer mining claims was illegal because wholly unauthorized. A public official cannot deal in his public

capacity with claims of this sort as if he were a private owner of the lands. This further illegal consideration for the lease is to be considered with all the illegal considerations heretofore noticed. No covenant of the Government based upon them can stand.

8. The award of the lease and contract without advertisement and competitive bidding was unlawful.

The provisions of the lease and contract for the building of storage facilities and the filling thereof with fuel oil certainly constitute the furnishing of supplies and of services other than personal services to the Government. In the Pan American case it was demonstrated and found as a fact that, while the Government purported to hold a competition between bidders for the building and filling of the Pearl Harbor fuel oil storage facilities, there was in truth no real competition whatever. Not even a pretense of competition was observed with reference to the instant lease and contract. And yet it is letter clear that Government contracts for supplies and services must be let by competitive bidding.

R. S. 3709 provides:—

> **"All purchases and contracts for supplies or services, in any of the Departments of the Government, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public** exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or serv-

> ices required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals."

Appellants seek to overcome the force of this Act by the argument that the Act of June 4, 1920, was an independent code and not subject to the provisions of R. S. 3709. We have argued this matter in full in the brief submitted to this Court in the Pan American case; and therefore do not intend again to elaborate it at any length. Suffice it to say that this Court in its opinion in the Pan American case definitely negatived any such argument as appellants now make. It definitely held that the Act of June 4, 1920, did not repeal or supersede the general statutes dealing with the establishment and construction of fuel depots. It further held that the said Act did not repeal the general statutes requiring moneys received from the sale of gas products to be paid into the treasury. The language of this Court is as follows:

> "• • • The Act of August 31, 1842, 5 Stat. 77 (R. S. 1552), gave the Secretary authority to construct fuel depots. But it was taken away by the Act of March 4, 1913, 37 Stat. 898. Since that time Congress has made separate appropriations for fuel stations at places specifically named. And it has long been its policy to prohibit the making of contracts of purchase or for construction work in the absence of express authority and adequate appropriations therefor.

R. S. 3732, 3733; Act of June 12, 1906, 34 Stat. 255; Act of June 30, 1906, 34 Stat. 764. The Secretary was not authorized to use money received from the sale of gas products. All such sums are required to be paid into the Treasury, R. S. 3617, 3618, as amended, 19 Stat. 249."

In answer to a like argument made in the Pan American case, the Ninth Circuit Court of Appeals (*9 Fed. (2d) 761*) stated at p. 770 of the opinion:

"It is not conceivable that by the rider to the appropriation bill Congress intended in that casual way to surrender its legislative functions as to the control and disposition of the naval oil reserves and the establishment of fuel oil depots for the navy, to revolutionize the established method of transacting the public business of the United States, and to repeal, so far as they relate to the oil reserves, sections 3732 and 3733, Rev. Stat., and sections 6884, 6885, 6886 and 6873, Comp. St., which forbid the making of contracts to bind the government beyond the amount appropriated therefor, unless otherwise specifically provided, and **section 3709, Rev. Stat., being Comp. St. section 6832, which makes competitive bidding and advertising indispensable to the making of all such contracts,** and sections 3617 and 3618 of Rev. Stat., being Comp. St. sections 6666, 6669, which make it obligatory to turn into the Treasury of the United States all proceeds of sales of royalty oils as was done prior to June 4, 1920, and as was expressly provided by the Act of February 25, 1920 (Comp. St. Ann. Supp. 1923, sections 4640^{1}_{4}-4640^{1}_{488}). If such had been

> the intention, it is but reasonable to assume that it would have been expressed in terms so clear as to exclude all doubt."

In view of the holdings of this Court and the Court of Appeals in the Pan American case, we submit it is too late to make the argument that the Act of June 4, 1920, is an independent code, sufficient unto itself (Mammoth Brief, pp. 188-193).

9. The lease and contract contemplated the erection of fuel depots not authorized by Congress.

Appellants make the argument (Mammoth Brief, pp. 178-9) that neither the lease nor the so-called collateral agreement therein contained provides for any fuel depot or for any designated storage project or for the erection of any storage. Further, as to the supplemental agreement of February 9, 1923, they state that the record does not indicate that any of the tankage at Portsmouth or elsewhere contemplated thereby is in the least akin to the choosing or selecting or creating or constructing of any fuel depot. Counsel have not carefully read the record. Robison testifies (R. 611):

> "The fuel stations to be established under the Pan American contract of April 25th, or under the Mammoth Oil Company contract of April 7th, were to be complete reserve fuel stations. They are what are known in appropriations as fuel depots."

Again Robison testified (R. 637):

> "It was always the intention of the Navy Department and of the Interior Department, when the contracts were being discussed, and being made, to use all of the oil certificates under this Mammoth Oil contract for fuel and other petroleum products in tanks to be built and to constitute naval fuel reserve depots."

Again Robison says (R. 654):

> "By that I meant that after we transformed the royalty into cash we could not thereafter legally use any of that cash. The cash had to go into the Treasury miscellaneous receipts and could only be gotten out by appropriation; so that unless we could accomplish this business as a whole, including the provision of the fuel reservoirs at our naval stations, without the transformation of the royalty into another form than a means of exchange between the royalty itself, and the finished fuel depots, I think are the words you used, we had no legal right, and this was one way that I know of that we could do what we felt the nation needed, so we did it."

We call attention also to the fact that in Article I of the contract of February 9, 1923 (R. 38), project "B" is designated "Naval Fuel Depot, Melville, Rhode Island," and project "D" is designated "Naval Fuel Station, Yorktown, Va."

We further call attention to the fact that the testimony of Admiral Parks shows that on October 7, 1918, as representing the Navy, he requested of the

Committee on Appropriations of the House of Representatives an appropriation of $322,500 for coal and fuel oil storage to complete the project for tank construction at Yorktown, Va., which is one of the projects mentioned in the contract of February 9, 1923 (R. 433-4). The same witness, at R. 434, testifies that in the consideration of the naval appropriation bill for 1922 he requested an appropriation in the sum of $1,836,000 for depots for coal and other fuel, including the sum of $129,988 for such use at Melville, R. I., which is likewise one of the projects mentioned in the contract of February 9, 1923.

Congress did not make the appropriations.

The storage facilities to be constructed by the Mammoth Oil Company and to be paid for in oil certificates are confessedly not only "fuel depots" but also form part of that "fuel depot" building plan, involving the ultimate expenditure on the Atlantic and Pacific Coasts of approximately $103,000,000. In the Pan American case this Court definitely held that no such program had been authorized by Congress:

> . . . The record shows that the Navy Department estimated the cost of proposed storage plants and contents at approximately $103,000,000. Congress has not authorized any such program. The Department tried and failed to secure additional appropriations for the Pearl Harbor storage facilities. The Act of August 31, 1842, 5 Stat. 577 (R. S. 1552), gave the Secretary authority to construct fuel depots. But it was taken away by the Act of March 4, 1913,

37 Stat. 898. Since that time Congress has made separate appropriations for fuel stations at places specifically named."

In view of the above testimony, which we may add is all of the testimony in the record on the subject, and in view of the conclusion reached by this Court in the Pan American case on the subject of fuel depots, can there be any room for the argument that the lease and contract did not contemplate the building of fuel depots unauthorized by Congress or that such storage facilities were not illegal?

F. SINCLAIR CRUDE OIL PURCHASING COMPANY AND SINCLAIR PIPE LINE COMPANY ARE NOT ENTITLED TO ANY MODIFICATION OF THE DECREE OF THE COURT OF APPEALS.

1. The court found these appellants were *mala fide* trespassers.

There can be no question that a fraudulent or *mala fide* trespasser upon the public domain must cease to trespass and cannot be allowed the value of any fixed or permanent improvements placed upon the land. One of these appellants placed a pipe line on the surface of the Reserve as the "nominee of Mammoth Oil Company." It will be remembered that Article II of the lease of April 7, 1922, provided that when a certain production was reached Mammoth Oil Company should construct a pipe line which would serve the Salt Creek field and Naval Petroleum Reserve No. 3 (R. 18-20). That article provided that Mammoth Oil

Company might, in lieu of constructing this pipe line itself, have the same constructed by a nominee (R. 18).

Although by December, 1922, Mammoth Oil Company had not reached that stage of the development of Teapot Dome which called for the construction of a pipe line, it did then become the purchaser of the Salt Creek royalty oils running to the Government on the various government leases in the Salt Creek field and it did then make an arrangement or agreement with Secretary Fall that it would begin the construction of a pipe line and it was agreed to arrange that the Sinclair Pipe Line Company, or some subsidiary of Sinclair Pipe Line Company, should construct the pipe line (see the formal agreement to this effect R. 84 ff.). These facts in and of themselves are persuasive evidence of the close community of interest of Mammoth Oil Company and Sinclair Pipe Line Company.

As soon as Mammoth Oil Company started development of the Reserve some facilities were required for storing crude oil until the same could be moved either through a pipe line or otherwise. Mammoth Oil Company therefore provided large steel storage tanks to hold the crude oil as it came from the ground. Not until January, 1923, did Mammoth Oil Company make arrangements to sell and turn over these tanks (and apparently the oil contained therein) to Sinclair Crude Oil Purchasing Company (R. 74).

The Court of Appeals held that both of these companies were *mala fide* trespassers because they were

affected with notice and knowledge of the circumstances surrounding the making of the lease of April 7, 1922 (R. 850-51). We submit that the Court of Appeals was justified in so holding.

The Sinclair Pipe Line Company admittedly is owned one half by the Sinclair Consolidated Oil Corporation and one half by the Standard Oil Company of Indiana (R. 559-60; 613; 676). The Sinclair Crude Oil Purchasing Company is likewise owned half and half by said two concerns (R. 457; 676). The record shows that when the Sinclair Crude Oil Purchasing Company was to act in the Continental Trading Company matter, Sinclair and R. W. Stewart, President of the Standard Oil Company of Indiana had the power to control its action, to speak for it and to bind it by contracts made on its behalf (R. 448; 450). That Sinclair was the controlling factor in Mammoth Oil Company (R. 567) and in Sinclair Consolidated Oil Corporation is also disclosed by the record (R. 551-52; 556; 560).

Appellants seek to avoid constructive notice through Sinclair by claiming that he occupied an antagonistic position (Sinclair Pipe Line Brief, p. 11). He did not occupy an antagonistic position. All that he could make out of the transaction would be made through his stock ownership in the three appellant corporations. Under similar circumstances, this Court had no difficulty in charging the Pan American companies with notice of Doheny's fraud.

Before the arrangements above mentioned were made either with Sinclair Crude Oil Purchasing Com-

pany or Sinclair Pipe Line Company, the Senate of the United States, acting upon charges of fraud, collusion and bad faith made before it, had by two resolutions initiated an investigation of the circumstances surrounding the making of the lease. The Senate resolutions in question were passed respectively on April 29, 1922, and June 5, 1922, and are numbered 282 and 294. Concerns so closely connected with Mammoth Oil Company and having dealings subsequent to the passing of these resolutions and to the public agitation with respect to the fraudulent character of the lease were certainly, as a matter of fact, upon notice of the question of the good faith of Mammoth Oil Company which had been publicly raised. Senate Document 210, Fall's answer to the inquiry of the Senate, was sent to the Senate on June 3, 1922, and was obviously an attempted answer to the allegations of fraud made in the lease. This document was given the widest publicity.

Not only may this Court take judicial notice of Senate Resolutions Nos. 282 and 294 and the wide publicity given to their passage and the impending investigation by the Senate into rumors and charges of fraud in the leasing of the Teapot Dome (Swift & Co. *vs.* Federal Trade Commission, 8 Fed. (2d) 595, 1925; Tempel *vs.* United States, 248 U. S. 121, 1918; Simpson *vs.* United States, 252 U. S. 547, 1920); but also notice to and knowledge by all the directors of the appellant companies of said Senate Resolutions and the impending investigation may also be implied and presumed (Foster *vs.* Mansfield, etc.,

R. R. Co., 146 U. S. 88, 1892; Board of Commissioners *vs.* Chicago, etc., Ry. Co., 18 Fed. 209, 1883; Wright *vs.* Stewart, 130 Fed. 905 (1904); and Charles *vs.* Roxana Pet. Corp., 282 Fed. 983, 1922, certiorari denied 261 U. S. 614).

We submit, therefore, that there can be no question of the close community of interest and the effective managerial control between Sinclair's company, Mammoth Oil Company, and what were in effect Sinclair's companies, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company; and that Sinclair's transactions, if fraudulent with respect to the lease and operation of Teapot Dome, ought to affect these corporations claiming under the alleged rights acquired by Sinclair in the lease just as much as they ought to affect Sinclair's company, Mammoth Oil Company.

2. These appellants participated in the violation of the public policy of the United States involved in the lease to Mammoth Oil Company.

This Court has found in the Pan American case:

> "The grant of authority to the Secretary of the Navy (by the Act of June 4, 1920) did not indicate a change of policy as to the conservation of the Reserves. The Act of June 25, 1910, the Act of February 25, 1920, the Executive Orders, and the Joint Resolution of February 8, 1924, show that it has been and is the policy of the United States to maintain a great naval petroleum reserve in the ground."

The appellants in this cause were all upon notice of that public policy. The very resolutions requiring

the Senate Committee on Public Lands and Surveys to investigate the Mammoth lease referred to that preservation policy long before Sinclair Crude Oil Purchasing Company or Sinclair Pipe Line Company came into the picture. These two companies in close association with Sinclair cooperated in the carrying out of the program which flew in the face of and violated the long established public policy of the United States and which despoiled it of those public lands dedicated for the exclusive use or benefit of the Navy in the manner set forth in this Court's opinion in the Pan American case.

Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company no less than Mammoth Oil Company became parties to a subversion of this public policy and are no less than Mammoth Oil Company guilty of an attempt to violate it. It must have been here, as it was declared in the Pan American case to have been, "the purpose of those making the contracts and leases to subvert the laws and defeat the policy of the United States established for the conservation of the Naval Petroleum Reserves."

In such cases this Court has declared in no uncertain terms that the doctrine of **Causey vs. United States, 240 U. S. 339, United States vs. Trinidad Coal Company, 137 U. S. 160, and Heckman vs. United States, 224 U. S. 413** (two of which were cited and relied on by the Court of Appeals) held that the parties to illegal contracts subversive of the public policy of the Government are not entitled to any equity

or to any consideration or to the value of their improvements.

We submit that in this respect the position of the appellants, Sinclair Crude Oil Purchasing Company and Sinclair Pipe Line Company, is untenable, first, because in fact they are little different from ordinary subsidiaries of the Sinclair Consolidated Oil Corporation, which Sinclair himself controlled, and second, they made themselves, after full notice of the public policy of the United States concerning its Naval Petroleum Reserves, parties to an attempted subversion of that public policy. We submit, therefore, that the decree of the Court of Appeals as respects them, was correct and should not be modified.

G. CONCLUSION.

Upon the grounds (1) that the findings of the Court of Appeals of fraud, conspiracy and collusion are sustained by the evidence; (2) that the lease and contract in this case were subversive of the public policy of the United States, were contrary to law and were unauthorized by the Act of June 4, 1920, and (3) that all of the parties appellants to this record are affected by both the fraud and the violation of public policy, we respectfully submit that the decree of the Court of Appeals should in all respects be affirmed.

Respectfully submitted,

ATLEE POMERENE,
OWEN J. ROBERTS,
Special Counsel for the United States.

APPENDIX.

1. Executive order of withdrawal of April 30, 1915.

ORDER OF WITHDRAWAL.

Naval Petroleum Reserve No. 3, Wyoming No. 1.

It is hereby ordered that all lands hereinafter described and heretofore forming a part of Petroleum Reserve No. 8, withdrawn on July 2, 1910, from settlement, location, sale or entry and reserved for classification and in aid of legislation under the authority of the Act of Congress approved June 25, 1920 (36 Stat., 847), entitled "An act of Congress approved June 25, 1910 (36 Stat., 847), entitled "An act to authorize the President of the United States to make withdrawals of public lands in certain cases," as amended by act of Congress approved August 24, 1912 (37 Stat., 497), shall hereafter constitute Naval Petroleum Reserve No. 3, and shall be held for the exclusive use or benefit of the United States Navy until this order is revoked by the President or by Congress. To this end and for this public purpose the order of July 2, 1910, is modified and the withdrawal of that date is continued and extended insofar as it affects these lands.

Sixth Principal Meridian.

T. 38, N., R. 78 W.,
Sec. 2, SW.¼ of NE.¼, W.½ W½ of SE¼;
Sec. 3, all;
Sec. 4, NE¼, NE¼ of NW¼, N½ of SE¼, SE¼ of SE¼;
Sec. 9, E½ of NE¼, NE¼ of SE¼;

Sec. 10, all;
Sec. 11, W½ of NE¼, W½, SE¼;
Sec. 14, all;
Sec. 15, N½, N½ of SW¼, SE¼ of SW¼, SE¼;
Sec. 22, NE¼, NE¼ of NW¼, E½ of SE¼;
Sec. 23, all;
Sec. 26, NW¼ of NE¼, N½ of NW¼.

T. 39 N., R. 78 W.,

Sec. 16, NE¼ of SW¼, S½ of SW¼, SW¼ of SE¼;
Sec. 20, E½ of NE¼, SE¼;
Sec. 21, all;
Sec. 22, SW¼ of NW¼, SW¼;
Sec. 27, W½ of NE¼, W½, SE¼;
Sec. 28, all;
Sec. 29, E½, E½ of NW¼, N½ of SW¼, SE¼ of SW¼;
Sec. 32, N½ of NE¼, SE¼ of NE¼;
Sec. 33, N½, N½ of SW¼, SE¼ of SW¼, SE¼;
Sec. 34, all;
Sec. 35, SW¼ of NW¼, W½ of SW¼, SE¼ of SW¼.

WOODROW WILSON.
President.

30 April, 1915.

2. Act of June 4, 1920 (41 Stat. 812).

Investigation of Fuel Oil and Other Fuel: For an investigation of fuel oil, gasoline, and other fuel adapted to naval requirements, including the question of supply and storage and the availability economically and otherwise of such supply as may be allowed by the naval reserves on the public domain, and for such other expenses for transportation and hire of vehicles in connection with naval petroleum reserves, as the Secretary of the Navy may deem appropriate, for the purchase of necessary instruments and appliances, for the extension of the naval fuel-oil testing plant at the navy yard, Philadelphia, Pennsylvania, and the temporary employment of civilian experts and assistants $30,000: *Provided*, That the Secretary of the Navy is directed to take possession of all properties within the naval petroleum reserves as are or may become subject to the control and use by the United States for naval purposes, and on which there are no pending claims or applications for permits or leases under the provisions of an Act of Congress approved February 25, 1920, entitled "An Act to provide for the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain," or pending applications for United States patent under any law; to conserve, develop, use, and operate the same in his discretion, directly or by contract, lease, or otherwise, and to use, store, exchange, or sell the oil and gas products thereof, and those from all royalty oil from lands in the naval reserves, for the benefit of the

United States: *And provided further,* That the rights of any claimant under said act of February 25, 1920, are not affected adversely thereby: *And provided further,* That such sums as have been or may be turned into the Treasury of the United States from royalties on lands within the naval petroleum reserves prior to July 1, 1921, not to exceed $500,000, are hereby made available for this purpose until July 1, 1922: *Provided further,* That this appropriation shall be reimbursed from the proper appropriations on account of the oil and gas products from said properties used by the United States at such rate, not in excess of the market value of the oil, as the Secretary of the Navy may direct.

3. Executive order of May 31, 1921.

EXECUTIVE ORDER.

Under the provisions of the Act of Congress approved February 25, 1920 (41 Stat. 437), authorizing the Secretary of the Interior to lease producing oil wells within any naval petroleum reserve; authorizing the President to permit the drilling of additional wells or to lease the remainder or any part of a claim upon which such wells have been drilled, and under authority of the act of Congress approved June 4, 1920 (41 Stat. 812), directing the Secretary of the Navy to conserve, develop, use, and operate, directly or by contract, lease, or otherwise, unappropriated lands in naval reserves, the administration and conservation of all oil and gas bearing lands in naval petroleum reserves Nos. 1 and 2, California, and naval petroleum reserve No. 3 in Wyoming, and naval shale reserves in Colorado and Utah, are hereby committed to the Secretary of the Interior subject to the supervision of the President, but no general policy as to drilling or reserving land located in a naval reserve shall be changed or adopted except upon consultation and in cooperation with the Secretary or Acting Secretary of the Navy. The Secretary of the Interior is authorized and directed to perform any and all acts necessary for the protection, conservation, and administration of the said reserves, subject to the conditions and limitations contained in this order and existing laws or such laws as may hereafter be enacted by Congress pertaining thereto.

WARREN G. HARDING.

THE WHITE HOUSE,
May 31, 1921.